FILE COPY

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1939

No. [illegible]

UNITED STATES OF AMERICA, APPELLANT,

vs.

EMPLOYERS LABORERS ASSOCIATION OF CHICAGO AND VICINITY, LOCAL NO. 76 OF WOOD, WIRE AND METAL LATHERS INTERNATIONAL UNION OF CHICAGO, ETC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

Probable jurisdiction noted December 18, 1939

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 439

UNITED STATES OF AMERICA, APPELLANT,

vs.

EMPLOYING LATHERS ASSOCIATION OF CHICAGO AND VICINITY, LOCAL No. 74 OF WOOD, WIRE AND METAL LATHERS INTERNATIONAL UNION OF CHICAGO, ETC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

INDEX

	Original	Print
Record from the U.S.D.C. for the Northern District of Illinois, Eastern Division	1	1
Complaint	3	1
Joint and several motion of certain defendants to dismiss complaint	19	11
Motion of Local No. 74 of Wood, Wire and Metal Lathers International Union of Chicago, Illinois and Vicinity to dismiss complaint	21	12
Transcript of proceedings on ruling on motions to dismiss	25	14
Reporter's certificate (omitted in printing)	37	
Memorandum opinion, Perry, J.	39	20
Order dismissing complaint	47	25
Petition for appeal	49	25
Order allowing appeal	51	26
Citation (omitted in printing)	53	
Assignment of errors and prayer for reversal	55	26
Statement directing attention to the provisions of Rule 12, paragraph 3 of the rules of the Supreme Court (omitted in printing)	93	
Praecipe (omitted in printing)	98	
Clerk's certificate (omitted in printing)	100	
Statement of points to be relied upon and designation of parts of record to be printed	101	27
Order noting probable jurisdiction	104	28

BLURRED COPY

BLEED THROUGH- POOR COPY

1-3 In United States District Court, Northern District of Illinois, Eastern Division

Civil Action No. 52 C 1639

Equitable Relief Sought

UNITED STATES OF AMERICA, PLAINTIFF

v.

EMPLOYING LATHERS ASSOCIATION OF CHICAGO AND VICINITY; LOCAL NO. 74 OF WOOD, WIRE AND METAL LATHERS INTERNATIONAL UNION OF CHICAGO, ILLINOIS AND VICINITY; HARRY D. FOLLETT; AND EDWARD D. CHOUINARD, DEFENDANTS

COMPLAINT—Filed July 31, 1952

The United States of America, by its attorneys, acting under the direction of the Attorney General, brings this complaint against the defendants named herein, and alleges as follows:

I

JURISDICTION AND VENUE

1. This complaint is filed and these proceedings are instituted against the defendants named herein under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 309, as amended (16 U.S.C. Sec. 4), entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, in order to prevent and restrain continuing violations by the defendants, as hereinafter alleged, of Sections 1 and 2 of that Act (15 U.S.C. Secs. 1, 2).

2. The defendants Employing Lathers Association of Chicago and Vicinity, Local No. 74 of Wood, Wire and Metal Lathers International Union of Chicago, Illinois and Vicinity, Harry D. Follett, and Edward D. Chouinard, as hereinafter alleged, maintain
4 offices and transact business within the Eastern Division of the Northern District of Illinois and are found therein.

II

DEFENDANTS

3. The following are named as defendants herein:

(a) Employing Lathers Association of Chicago and Vicinity, a corporation organized and existing under the General Not-for-Profit Corporation Act of the State of Illinois. Said cor-

BLURRED COPY

poration, sometimes hereinafter referred to as the "Association," is a trade association whose membership consists of 16 lathing contractors doing business in the Chicago area. The Association transacts business in Chicago, Illinois, and its records are kept by its secretary at 3354 N. Long Ave, Chicago, Illinois. The Association, which was incorporated in 1945, is the successor to prior unincorporated associations of lathing contractors located in the Chicago area.

(b) Local No. 74 of the Wood, Wire and Metal Lathers International Union of Chicago, Illinois and Vicinity, sometimes hereinafter referred to as "Local 74." The said Local 74 is an unincorporated trade union or association of individuals chartered by and operating under the authority of the Wood, Wire and Metal Lathers International Union. Its membership is composed of approximately 700 journeymen lathers and apprentices, who perform practically all of the lathing work in the Chicago area. It has its place of business and offices at 205 W. Wacker Drive, Chicago, Illinois.

(c) Harry D. Follett, an individual residing at 1015 N. Lombard Avenue, Oak Park, Illinois. The said Harry D. Follett is a lathing contractor doing business in the Chicago area, has been president of the defendant Association from approximately January 1951 to the date of the filing of this complaint, and was vice-president of the defendant Association from approximately August 1945 to January 1951.

(d) Edward D. Chouinard, an individual residing at 8028 S. Luella Avenue, Chicago, Illinois. The said defendant Edward D. Chouinard is a lathing contractor, has been a member of the Association for many years, and has been a member of its Joint Board of Arbitration.

4. Whenever in this complaint it is alleged that any corporate defendant or unincorporated association did any act or thing, such allegation shall be deemed to mean that such act was done by the officers, employees, agents, or representatives of such corporate defendant or unincorporated association.

III

Co-conspirators

5. Numerous lathing contractors, including those who are members of the defendant Association, were co-conspirators in the combination and conspiracy hereinafter alleged.

BLEED THROUGH– POOR COPY

IV

DEFINITIONS

6. As used herein, the term "lathing contractor" means an independent entrepreneur engaged in the business of entering
6 into and performing so-called "subcontracts" for the lathing of buildings. Such subcontracts are normally made with plastering contractors. Lathing contractors customarily enter into contracts based upon the furnishing of labor and part of the lathing materials by the lathing contractor, and the furnishing of the remainder of the lathing materials by the plastering contractor. Lathing contractors function as managers and owners of businesses and employ journeymen and apprentice lathers to perform the lathing operations which precede the application of the coats of plaster.

7. As used herein, the term "Chicago area" means that area within the recognized jurisdiction of Local 74. Such area includes most of Cook County and portions of Du Page and Lake Counties, Illinois.

V

NATURE OF TRADE AND COMMERCE

8. In most building construction in the Chicago area, contracts for lathing and plastering operations are generally executed with plastering contractors, who agree therein to furnish the plastering and lathing materials and to have the same installed. In performing said contracts, the plastering contractors sell and distribute plastering and lathing materials, and perform themselves the plastering work. In most instances, the plastering contractor enters into a subcontract with a lathing contractor for the installation of lathing materials in the building, said lathing materials being furnished by the plastering contractor to the lathing contractor. The contract of the plastering contractor for the sale and installation of plastering and lathing materials is not performed until the lathing materials are installed by the lathing contractor. The installation of lathing materials by lathing contractors is essential to the performance of contracts by plastering contractors for the sale of said materials to general contractors or building owners.

7 9. There are approximately 36 lathing contractors in the Chicago area who are engaged in the business of performing lathing contracts for the installation of lathing materials in buildings. The dollar volume of the lathing contracts entered into by the lathing contractors in the Chicago area in 1951 amounted to more than $8,000,000.

10. Approximately 16 of the above referred to lathing contractors in the Chicago area are members of the defendant Association.

BLURRED COPY

The dollar volume of lathing contracts entered into by lathing contractors who are members of the defendant Association totaled in excess of $5,000,000 in 1951, or over 60% of the total amount of lathing contracting business in the Chicago area in that year.

11. The materials, herein referred to as lathing materials, used and installed by lathing contractors in the performance of lathing contracts, include gypsum lath, metal lath, cornerites, corner beads, channel irons, and tie-wire. A major part of all of said lathing materials used in the performance of lathing contracts in the Chicago area is produced in States other than State of Illinois, and is shipped in interstate commerce from said States into the Chicago area for sale and installation therein.

12. Customarily, the lathing materials installed by lathing contractors in the Chicago area are purchased from building material dealers in the area, who purchase said materials from out-of-State sources for resale to plastering contractors, who in turn deliver the same to lathing contractors for installation. Substantial quantities of said lathing materials are purchased from out-of-State sources by said building material dealers in response and pursuant to prior orders placed with said dealers by plastering contractors, and, upon receipt of said materials from said out-of-State sources, said materials are then delivered to the plastering contractors who ordered the same, and are then delivered by said plastering contractors to the lathing contractors for installation.

8 13. Substantial quantities of lathing materials purchased by plastering contractors in the Chicago area are obtained from building material dealers who have in turn secured said materials from out-of-State sources in order to meet the regular anticipated demand of said plastering contractors. Said lathing materials purchased by such dealers from out-of-State sources to meet the regular anticipated demands of said plastering contractors move in a continuous flow in interstate commerce from said out-of-State sources through the dealers and plastering contractors to the lathing contractors for installation.

14. Substantial quantities of lathing materials purchased by plastering contractors through building material dealers are obtained from manufacturers, dealers, or other sources outside the State of Illinois who ship directly to the job site or place of business of said contractors in the Chicago area for delivery to the lathing contractor for the performance of lathing contracting work. Said lathing materials so sold and installed in the Chicago area flow in a continuous, uninterrupted stream from the points of origin in States other than the State of Illinois to the job site for installation and use in buildings and other structures in the Chicago area.

15. Consumers of lathing materials ordinarily do not install said materials, and this service is customarily performed by lathing con-

BLEED THROUGH— POOR COPY

tractors, who employ and supervise skilled labor for this purpose. The service performed by lathing contractors in the Chicago area in the installation of lathing materials is an integral part of, and necessary to, the movement in interstate commerce of lathing materials which are manufactured in States other than the State of Illinois and which are distributed and installed in the Chicago area. Thus, lathing contractors are conduits through which lathing materials manufactured and shipped from States other than the State of Illinois are applied to their intended use in the construction of buildings in the Chicago area. The function performed by said lathing contractors in the installation of said lathing materials in buildings is essential to the interstate flow of said materials, since said lathing materials are of no use to the ultimate purchaser until they are installed in buildings. Said lathing materials flow in a continuous stream from their points of origin in States other than Illinois to their final installation and use in buildings in the Chicago area.

16. The lathing operation is an integral part of the building construction industry, which, in the Chicago area in 1951, engaged in new building construction and remodeling to the value of approximately a half billion dollars, and the performance of said lathing operation is necessary to the completion of other building operations, including plastering and interior painting and decoration, and the installation of plumbing fixtures, heating and air conditioning outlets and vents, electrical outlets and fixtures, flooring and interior wood trim, and window and door sashes. A substantial part of all of said building materials and appurtenances is produced in States other than Illinois and is sold and shipped in interstate commerce from said States to the Chicago area for distribution and use in buildings in said area.

17. The installation or use in buildings of said building materials and appurtenances is an integral part of, and necessary to, the movement in interstate commerce of said materials manufactured in States other than the State of Illinois and which are distributed, sold and installed in the Chicago area. Substantial quantities of said building materials and appurtenances flow in a continuous uninterrupted stream from their points of origin in States other than Illinois to the places of installation and use in buildings in the Chicago area.

18. Any restraint upon or disruption in or interference with the performance of lathing work in the Chicago area necessarily and directly restrains and affects the interstate flow of lathing materials, and also constitutes a direct and substantial burden and restraint upon the interstate flow of all of the hereinbefore referred to building materials and appurtenances entering into the construction of buildings in the Chicago area.

BLURRED COPY

10

VI

THE COMBINATION AND CONSPIRACY

19. For many years past, the exact beginning date to the plaintiff unknown, and continuing to the date of the filing of this complaint, the defendants and their co-conspirators, and others to the plaintiff unknown, have engaged in an unlawful combination and conspiracy to suppress competition among the lathing contractors in the Chicago area, and to restrict and exclude persons from engaging in the lathing contracting business in said area, in unreasonable restraint of the hereinbefore described trade and commerce among the several States, and to monopolize the installation in the Chicago area of lathing materials flowing in interstate commerce as hereinbefore described, in violation of Sections 1 and 2 of the Act of Congress of July 2, 1890 (15 U.S.C. Secs. 1, 2), commonly known as the Sherman Act. Said offenses are continuing and will continue unless the relief hereinafter prayed for in this complaint is granted.

20. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among the defendants, the co-conspirators, and others to the plaintiff unknown, the substantial terms of which have been and are that they agree:

(a) To restrict and reduce the number of lathing contractors permitted to engage in the lathing contracting business by:

(1) Excluding any person from becoming a lathing contractor who has not first secured the approval of Local 74;

(2) Denying the right to become a lathing contractor to any person who has not first been a member of Local 74 for five years;

(3) Denying to any person, who has not first obtained the approval of Local 74 to become a lathing contractor, the right to employ members of Local 74;

11 (4) Restricting and reducing, by arbitrary racial and family relationship standards, the number of apprentice and journeymen lathers accepted into membership in Local 74;

(b) To assign particular plastering contractors to certain designated lathing contractors, thereby eliminating the competition among lathing contractors for the business of said plastering contractors, and depriving said plastering contractors of their right to choose the lathing contractors with whom they wish to do business;

(c) That the defendants eliminate competition in the lathing field between lathing contractors and plastering contractors by freezing and reducing the number of plastering contractors who are permitted to hire members of Local 74;

BLEED THROUGH– POOR COPY

(d) That the defendant Association and co-conspirators effectuate payments of money to officers of defendant Local 74 to induce them to utilize the power of that Local in furtherance of the conspiracy.

21. During the period of time covered by this complaint and for the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and their co-conspirators by agreement and concert of action, have done the things which, as hereinbefore alleged, they conspired to do, and more particularly have done, among others, the following acts and things.

22. In furtherance of the conspiracy to restrict competition in the lathing field, the defendant Local 74 has adopted, maintained, and enforced restrictions governing entry into the lathing contracting business in the Chicago area. Thus, Local 74 requires persons desiring to enter the lathing contracting business first to make application to and receive the approval of Local 74 as a prerequisite to entering the business. Persons who have failed to receive the approval of Local 74 have been denied the right to hire
12 Local 74 journeymen lathers and apprentices, and thereby have been excluded from the lathing contracting business in the Chicago area. Local 74 further refuses to consider or approve applications except from persons who have been journeymen members of Local 74 for five years. As a result, no person who has not been a journeyman member of Local 74 is permitted to engage in the lathing contracting business in the Chicago area.

23. Prior to the beginning of this conspiracy, a number of plastering contractors in the Chicago area hired journeymen lathers who were members of Local 74 to perform lathing work rather than subcontract such work to lathing contractors. With the inception of this conspiracy, and in furtherance of it, the defendant Local 74 instituted the practice of refusing to permit additional plastering contractors to hire journeymen lathers. As a result of this practice, there has been a reduction in the number of plastering contractors permitted to hire lathers directly, and at the present time there are only seven union plastering contractors in the Chicago area out of approximately 140 who may thus hire journeymen lathers directly. The remainder must subcontract their lathing to lathing contractors.

24. To encourage Local 74 to effectuate the restriction and reduction of competition in the lathing contracting business, the defendant Association has from time to time paid sums of money to officers of Local 74. The Association made seventy-five per cent of its dues available for such payments, and designated its Promotion Manager to pay sums of money and other considerations to officers and business agents of Local 74. The Association furthermore employs the President of Local 74 at a substantial salary

BLURRED COPY

to act as Managing Director of a foundation which has been established and is financed by Chicago area lathing contractors for the purported purpose of promoting the lathing industry.

25. Pursuant to the conspiracy charged herein, Local 74 has adopted and maintained restrictive membership rules and policies which curtail the number of persons eligible to become
13 members of Local 74 and to qualify as lathing contractors. Thus, it restricts admission of apprentices into membership into Local 74 to those persons who are relatives of journeymen lathers who are already members of Local 74. It has also arbitrarily excluded applicants of the negro race from becoming apprentices or from being admitted to membership as journeymen lathers. Local 74 has also refused to accept into membership journeymen lathers of the negro race who have attempted to transfer memberships to Local 74 from out-of-State lathers' unions affiliated with the same International Lathers Union with which Local 74 is affiliated.

26. For many years each lathing contractor registered with Local 74 the plastering contractor or contractors for whom such lathing contractor performed lathing subcontracts. Upon such registration, it was understood by all other lathing contractors that the registered plastering contractors were "assigned" to the lathing contractor who had registered their names. Thereafter, all other lathing contractors in the Chicago area refrained from soliciting the business of such "assigned" plastering contractors and refrained from submitting bids to, or performing lathing work for, such assigned plastering contractor. The operation of the above described "assignment" plan resulted in each plastering contractor in the Chicago area being confined to one lathing contractor and being denied the right to obtain competitive bids from two or more lathing contractors. Furthermore, each plastering contractor was prohibited from entering into subcontracts with more than one lathing contractor.

27. Under the operation of the foregoing registration system, whenever a plastering contractor sought to change its lathing subcontractor, such plastering contractor had first to make application to, and receive the approval of, defendant Local 74. In many instances, Local 74 denied to such dissatisfied plastering contractors the right to change lathing subcontractors. As a result of such plan of "registration" and "assignment," competition among
14 lathing contractors was suppressed and plastering contractors were denied the right to enter freely into business arrangements with lathing contractors of their choice.

28. Operation of the above described plan of "assignment" caused dissatisfaction among plastering contractors and constituted one of the issues in dispute between plastering contractors and

BLEED THROUGH— POOR COPY

Local 74 during the fall of 1950. As a result of this dispute, Local 74 entered into an agreement with the plastering contractors recognizing the right of such plastering contractors to obtain bids from more than one lathing contractor and to contract for lathing work with more than one lathing contractor. Shortly thereafter, however, the defendants reached a mutual understanding whereby the so-called "registration" and "assignment" plan was to be continued under the sponsorship of the defendant Association rather than of Local 74. Thus, the members of the Association agreed not to solicit or perform lathing contracts for a plastering contractor who had been "registered" with the defendant Association by another lathing contractor as his "recognized" account, unless such other lathing contractor consented to such competition. Each member of the defendant Association agreed to "register" with the Secretary of the Association the names of those plastering contractors "claimed" by such lathing contractor as his accounts.

VII

Effects of the Conspiracy

29. The effects of the aforesaid combination and conspiracy, among others, have been as follows:

(a) The number of lathing contractors in the Chicago area has been reduced from approximately 95 in 1925 to approximately 36 at the present time and the right of union contractors to hire union journeymen lathers and apprentices has been unlawfully restrained and impeded;

(b) Competition among lathing contractors in the Chicago area has been unlawfully restrained and the traditional American right of a person to enter into a business of his own choice without hindrance of illegal restraints of trade has been impaired and thwarted;

(c) The cost of building construction in the Chicago area has been artificially and illegally increased;

(d) The public has been denied the benefits in the construction industry in the Chicago area which would result from competition free from the illegal restraints in the lathing phases of the building construction industry;

(e) Interstate trade and commerce in lathing and related building materials has been unlawfully restrained.

Prayer

Wherefore, plaintiff prays:

1. That the Court adjudge and decree that the aforesaid combination and conspiracy entered into by the defendants and all the

BLURRED COPY

acts done pursuant thereto constitute an unlawful restraint of interstate trade and commerce in violation of Sections 1 and 2 of the Sherman Act.

2. That the defendants, and each of them, and their directors, officers, and agents, and employees, be enjoined from continuing, renewing, or reviving the unlawful combination and conspiracy hereinbefore alleged, or any combination or conspiracy having a similar purpose or effect.

3. That defendants and each of them be enjoined from requiring persons desiring to enter the lathing contracting business to apply to and secure the approval of Local 74 and that Local 74 be enjoined from adopting or maintaining any policy, rule, or by-law having the purpose or effect of preventing or restricting any prospective lathing contractor from entering such business;
16 provided, however, that nothing in the judgment entered in this cause shall prevent or prohibit Local 74 from requiring persons who wish to employ Local 74 members to agree to abide by union contract requirements as to wages, hours of employment, and other legitimate terms of working conditions.

4. That the defendant Local 74 be enjoined from adopting, maintaining, or enforcing any rule or restriction having the purpose or effect of preventing or restricting members of Local 74 from engaging in the lathing contracting business.

5. That Local 74 be enjoined from prohibiting, restricting, or preventing any person, including but not limited to any plastering contractor, from employing or hiring members of Local 74 to perform lathing work so long as such person will agree to abide by union contract requirements as to wages, hours of employment, and other legitimate terms of working conditions.

6. That Local 74 be enjoined from continuing, establishing, or maintaining any policy, rule, or requirement relating to admission of journeymen or apprentices into membership in Local 74 which is based upon race, religion, national origin, or family relationship to an existing member of the Local and which may have the effect of limiting the number of those eligible to enter the lathing contracting business.

7. That the defendants, and each of them, be enjoined from establishing, continuing, maintaining, fostering, or participating in any plan, program, or understanding to allocate, register, or "assign" plastering contractors or lathing jobs to particular lathing contractors.

8. That the Court enter such orders with respect to the rules, by-laws, and charter of the defendant Association and of the defendant Local 74 as is necessary to prevent the restrictive practices herein alleged and to carry out and enforce the terms of the judgment entered in this cause.

BLEED THROUGH– POOR COPY

17-18 9. That the plaintiff have such other, further, and different relief as the nature of the case may require and the Court may deem appropriate in the premises.

10. That the plaintiff recover the costs of this suit.

WILLIS L. HOTCHKISS,
Special Assistant to the Attorney General.

E. HOUSTON HARSHA,
HARRY H. FARIS,
CHARLES W. HOUCHINS,
Trial Attorneys,
Suite 820, 208 South LaSalle Street,
Chicago 4, Illinois,
Central 6-6886.

JAMES P. MCGRANERY,
Attorney General.

NEWELL A. CLAPP,
Acting Assistant Attorney General.

GEORGE B. HADDOCK,
Special Assistant to the Attorney General.

OTTO KERNER, JR.,
United States Attorney.

19-20 IN UNITED STATES DISTRICT COURT

[Title omitted]

JOINT AND SEVERAL MOTION OF CERTAIN DEFENDANTS TO DISMISS COMPLAINT—Filed October 21, 1952

Defendants Employing Lathers Association of Chicago and Vicinity, Harry D. Follett and Edward D. Chouinard, by their attorneys, jointly and severally move the Court to dismiss the Complaint herein for failure to state a claim upon which relief can be granted, on the grounds that:

1. The commerce alleged to be restrained is intrastate commerce only, and interstate commerce is not shown by the facts alleged to have been directly or substantially affected by the conduct charged to defendants, nor intended by defendants to be so affected;

2. The facts alleged in the Complaint do not constitute unreasonable restraints of, or agreements to restrain unreasonably, an appreciable segment of commerce;

3. The facts alleged in the Complaint do not constitute monopol-

BLURRED COPY

ization, or a combination or conspiracy to monopolize, any part of trade or commerce among the several States.

HOLLAND F. FLAHAVHAN,
LEO F. TIERNEY,
CHARLES L. STEWART, JR.,
Attorneys for Defendants Employing Lathers Association of Chicago and Vicinity, HARRY D. FOLLETT *and* EDWARD D. CHOUINARD.

21 IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS COMPLAINT—Filed October 21, 1952

Now comes the Defendant, Local No. 74 of Wood, Wire and Metal Lathers International Union of Chicago, Illinois and Vicinity, by its attorneys, Nathan M. Cohen and Asher, Gubbins and Segall, and pursuant to Rule 12 (b) of the Federal Rules of Civil Procedure, moves to dismiss the complaint herein for the reason that said complaint fails to state a claim upon which relief can be granted.

The complaint herein fails to state a cause of action under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended (15 U.S.C. Section 4), commonly known as the Sherman Act. Defendant, Local No. 74, contends said complaint fails to allege any act on the part of said Local No. 74 in violation of Sections 1 and 2 of said Sherman Act (15 U.S.C. Sections 1 and 2) for the following reasons:

1. The complaint fails to allege that the Defendant, Local No. 74, has committed any act in violation of any law of the United States and specifically fails to allege that the Defendant, Local No.
22 74, has committed any act in violation of Section 1 of the Act of Congress of July 2, 1890 (15 U.S.C. Sec. 1) commonly known as the Sherman Act.

2. The complaint fails to allege that the Defendant, Local No. 74, has committed any act which constitutes engaging in an unlawful combination and conspiracy in violation of Section 2 of the Act of Congress of July 2, 1890, as amended (15 U.S.C. Sec. 2), commonly known as the Sherman Act.

3. The complaint fails to allege that Local No. 74 has engaged in any act which has a necessary tendency to cause direct and undue restraint of competition in intersate commerce.

4. The complaint fails to allege that Local No. 74 has committed any act whatsoever which directly or indirectly affects production,

BLEED THROUGH— POOR COPY

prices, or the maintenance of trade of any commodity flowing in interstate commerce.

5. The complaint fails to allege any act committed by any of the co-Defendants named herein which constitutes an unlawful combination and conspiracy to affect the production, price, or purchase of any commodity flowing in interstate commerce.

6. Section 6 of the Act of October 15, 1914, Chapter 23, 38 Stat. 731 (15 U.S.C. Sec. 17) eliminates the possibility of any violation of Sections 1 and 2 of the Sherman Act cited above by the Defendant, Local No. 74 based upon the facts alleged in the complaint herein.

23-24 7. No act is alleged in the complaint to have been committed by Local No. 74 or any other of the named defendants which has resulted in eliminating or curbing price competition with respect to any article or commodity whatsoever sold in interstate commerce.

WHEREFORE, Defendant, Local No. 74, prays that this Honorable Court dismiss all of the counts of the complaint herein in which said Local No. 74 is named as a Defendant.

*—— ——,

---

* Note: Original not signed.

Attorneys for Local No. 74, one of the Defendants herein.

NATHAN M. COHEN,
Attorney for Defendant,
Suite 1045,
209 South La Salle Street,
Chicago 4, Illinois,
FRanklin 2-4137.

ASHER, GUBBINS & SEGALL,
Suite 1815,
130 North Wells Street,
Chicago, Illinois,
CEntral 6-8224.

BLURRED COPY

25 IN THE UNITED STATES DISTRICT COURT

Civil Action

No. 53 C 125

JOSEPH HOWARD, et al., Plaintiffs,

vs.

LOCAL 74, WOOD WIRE AND METAL LATHERS INTERNATIONAL UNION, et al., Defendants.

Civil Action

No. 52 C 1639

UNITED STATES OF AMERICA, Plaintiff,

vs.

EMPLOYING LATHERS ASSOCIATION OF CHICAGO AND VICINITY; et al., Defendants.

No. 52 CR 331

THE UNITED STATES

vs.

EMPLOYING LATHERS ASSOCIATION OF CHICAGO AND VICINITY; et al., Defendants.

Civil Action

No. 52 C 1640

UNITED STATES OF AMERICA Plaintiff,

vs.

EMPLOYING PLASTERERS ASSOCIATION OF CHICAGO; et al., Defendants.

No. 52 CR 332

THE UNITED STATES

vs.

EMPLOYING PLASTERERS ASSOCIATION OF CHICAGO; et al., Defendants.

BLEED THROUGH- POOR COPY

26 TRANSCRIPT OF PROCEEDINGS ON RULING ON MOTIONS TO DISMISS

Before HON. J. SAM PERRY, one of the judges of said court, in his courtroom in the United States Court House, Chicago, Illinois, on Monday, July 13, 1953.

By THE CLERK: 53 C 125, Howard et al. vs. Local 74, etc.;
52 C 1639, United States vs. Employing Lathers Association of Chicago, etc.;
52 CR 331, United States vs. Employing Lathers Association, etc.;
52 C 1640, United States vs. Employing Plasterers Association of Chicago, et al.;
52 CR 332, United States vs. Employing Plasterers Association of Chicago, et al.
Ruling on motions to dismiss.

27 THE COURT: Gentlemen, this case has given me a great deal of concern. I have devoted a great deal of time to it.

Of course, for the purposes of this motion only, all of the allegations stand admitted. I say that cautiously, for the purpose of this motion only. When I come to rule I must take it as presumed that every well pleaded fact is true, in order for me to rule upon this motion, and I take it that it is true that there are the racial discriminations, for the purpose of this motion; I take it that it is true that there are the other restrictions, the five-year restriction about journeymen, and the other agreements. On that basis I have arrived at a conclusion. In the beginning I may point out that it is alleged there are 36 lathing contractors in the Chicago area, that about $8,000,000 worth of business was done in the year 1951, and that approximately 16 of said 36 contractors are members of the defendant association, and that they did about

28 $5,000,000 of the $8,000,000 worth of work. In other words, they did 60 per cent, which is a very substantial part of the total amount of the lathing. I am referring now to the lathing situation. From my point of view it would not make any difference if they did 100 per cent of it, as I view the law.

I will review the heart of the indictment very briefly, referring now only to the lathing indictment, for what goes as to the lathing indictment will go for the other also, for the plasterers. The indictment alleges that customarily lathing materials installed by lathing contractors in the Chicago area are purchased from building material dealers in the Chicago area who purchase said material from out-of-state concerns for resale to said plastering contractors who in turn deliver the same to lathing contractors for installation. I am taking the Chicago area to mean the State of Illinois. As far

BLURRED COPY

as I can find, there is nothing in the allegations that indicates anything else than that when they speak of the Chicago area the reference is to Chicago, Cook County, DuPage County, Lake County, the whole thing in this particular area here, and
29 not crossing over any state lines. After alleging the aforesaid facts, which I am not repeating but which were in the allegations, the indictment charges that substantial quantities of lathing material are purchased from out-of-state sources by building material dealers in response to and pursuant to prior orders placed with said dealers by plastering contractors, and which building material is subsequently delivered to the plastering contractors and redelivered to the lathing contractors for installation.

The indictment then charges that substantial quantities of lathing material are purchased by plastering contractors for building materials, who have in turn secured said building materials from out-of-state sources in order to meet regularly anticipated demands of plastering contractors. In other words, the first allegation there is that the plastering contractors order materials from building materialmen and that the building materialmen themselves buy it out of state and it is shipped apparently to them, and then after it has arrived in the Chicago area it is sold to the plastering contractors who then furnish it to the lathing contractors.

30 The second one is the same thing, except that when they place the order they get it right quickly because they have already stockpiled.

There is a third phase of the indictment. The indictment further charges that substantial quantities of building material purchased by plastering contractors through building material dealers are obtained from manufacturers and dealers and other sources outside of the State of Illinois, who ship directly to the job site or place of business of said contractors in the Chicago area for delivery to the lathing contractors. The only difference between that and the first one is that in place of the delivery going to the building contractor, the material contractor simply sends it straight to the job as a matter of convenience. There is not anything there I can see, any allegation, that the plastering contractor buys that from out-of-state himself. If he did, if there were such an allegation and if that were the fact, then we would have to go to trial on the issues, because there would then be involved commodities passing in interstate commerce. But that is not the situa-
31 tion as I see it here.

There is no allegation of any effect of that intrastate conspiracy upon the interstate market price of the building material involved. I might add, so far as I can see there is no allegation of any discrimination or anything that would cause a man to buy his building material in Wisconsin or in Chicago or in California,

BLEED THROUGH— POOR COPY

no restraint that I can find in the allegation. There is no allegation of fact of its effect upon the flow of materials into the State of Illinois. We are dealing here with a local restraint and monopoly of local labor, and when I say local I mean Illinois, restraint right here in Illinois, restraint upon local labor service, Illinois service. They do not become associated with the building material until after the building materials have been purchased and have come to a state of rest in the State of Illinois.

To make that perhaps a little clearer, it looks to me, as I view it, that whatever restraint there is takes place after all the buying and selling is done, the water line is complete and the water is being sprayed out, so to speak, and they are picking it up in buckets and doing what they are doing with it, but they are not cutting
32 the line above. That is the way I look at it, and I cannot see where the Sherman Act was intended by Congress to interfere with local affairs even though they might be malicious, even though they might be economically unsound, even though they might be unfair and even though they might be illegal. For all I know, some of the actions might violate the Taft-Hartley Act; for all I know some of them might violate the Civil Rights Act. But I am not interpreting the Civil Rights Act. This indictment is brought specifically and is limited to and deals only with the Sherman Act. It is purely conjectural that this practice may remotely and indirectly affect the flow of commerce. It might do it. It might be that it has reduced the number of buildings that are built in this area, it might be it has driven building elsewhere, it might be that it has driven an industry elsewhere, but that is not alleged in the indictment and it would be purely conjectural anyway in my judgment.

There is no allegation showing these defendants intended to burden interstate commerce by this alleged conspiracy. There is no
33 showing that they intended to burden interstate commerce, and there is no allegation of fact that it does, and, to put it frankly, if this were a situation where houses were being built, and there were the one additional allegation that after the houses were built, instead of being attached to the real estate and becoming part and parcel of the local community, that they were put on box cars and sent to Indiana or Wisconsin, if some of the materials had come from there, or to California or any other state in the nation, then you would have interference with interstate commerce that would come under the Sherman Act and you would then have these interferences entering into and affecting the actual price of the commodity as it goes from here elsewhere, and that might very well be a restraint of trade such as would come under the Sherman Act.

In the light of the authorities and the view this Court has taken of the indictments, the complaints do not state a cause of action

BLURRED COPY

under the anti-trust laws. I cannot bring myself to extend the law, as a mere District court. I cannot extend the law by interpretation, because if I did extend it in this case then we would have the
34 law covering every step from the beginning of manufacture to the final consumption, and each and every act of every kind would come under the Sherman Act. In my judgment that would not be within the intention of the Congress. If Congress wishes this Act extended it has the authority under the commerce clause in all likelihood to do so. It may be that the Supreme Court might see this matter otherwise than I do, but it certainly is a matter for the Supreme Court to interpret.

For me to take the time of this Court and to take the time of the Government and the defendants in many weeks of testimony when in my sincere judgment the indictment does not state a cause of action would not be fair to the Government, to the parties, to the Court and to the litigants. It would be a waste of time and effort to so do.

Under the law such an action as this, being dismissed, can go straight to the Supreme Court which can pass directly upon the question of how far this may be extended.

Therefore, counsel will prepare the proper orders for dismissal in accordance with their desires in this case. While I have
35 been discussing primarily the lathing case the same motion will be entered in each of the other cases. That is the order of the court.

Mr. TIERNEY: As to the individual defendants named in the indictments, if they are under bond they will be discharged?

The COURT: Absolutely. Prepare the proper orders.

Mr. MCCLASKEY: My name is William McClaskey, from Moore & Leighton, representing the plaintiff Joseph Howard.

The first motion to be called this morning was for leave to the plaintiff Joseph Howard to file an amended complaint in 30 days from the date hereof.

The COURT: I did not have that called.

The CLERK: I did not call it, Judge.

The COURT: I only ruled on the motion.

Mr. MCCLASKEY: I beg your pardon. I understood——

The COURT: I will take a short recess for a minute, and then you may call that.

Mr. MCCLASKEY: Will that affect the parties here, in regard to this motion?

The COURT: As far as that motion to amend the complaint
36 is concerned, I would think that if you have a complaint on some other statute you should bring it under another statute and not seek to come in under this statute, because these other cases will be dismissed.

Mr. McCLASKEY: This is a motion to quash and, as I understand the ruling, your Honor's matter was a set matter.

The COURT: That is right.

Mr. McCLASKEY: I understood the motion of course should be called first.

The COURT: But if your case is dismissed on the set call what purpose would there be in calling a motion of course? Does your amendment purport to amend the complaint still under this particular Act?

Mr. McCLASKEY: That is my understanding. I came here for the plaintiff, for the attorneys for the plaintiff, Joseph Howard.

The COURT: Well, I don't see any point in granting you leave to file an amended complaint when I have just dismissed the whole suit here on the basis that I have arrived at. We would just be going over the same thing all over. I think the motion will be denied.

37-38 Mr. McCLASKEY: Motion denied?

The COURT: Then if you have other grounds or other statutes under which you wish to proceed I think it would be safer to file a separate, a completely new suit.

Motion denied.

Reporter's Certificate to foregoing transcript omitted in printing.

PLUBBED COPY

39 In United States District Court, Northern District of Illinois, Eastern Division

Civil Action No. 53 C 125

JOSEPH HOWARD, BERNARD HOWARD and PAUL HUGH, on their behalf and on behalf of all those persons similarly situated, PLAINTIFFS

vs.

LOCAL 74 of the WOOD, WIRE AND METAL LATHERS, INTERNATIONAL UNION OF CHICAGO, ILLINOIS AND VICINITY; ELMER LINDSAY, Personally and as President of Local 74; WILLIAM EBY, Personally and as Financial Secretary-Treasurer of Local 74; WOOD WIRE AND METAL LATHERS INTERNATIONAL UNION, A. F. OF L.; WILLIAM MCSORELY, Personally and as General President of Wood, Wire and Metal Lathers A. F. of L.; EMPLOYING LATHERS ASSOCIATION OF CHICAGO AND VICINITY, an Illinois corporation; HARVEY D. FOLLETT; EDWARD D. CHOUINARD, DEFENDANTS

Criminal Action No. 52 CR 331

UNITED STATES OF AMERICA, PLAINTIFF

vs.

EMPLOYING LATHERS ASSOCIATION OF CHICAGO AND VICINITY; LOCAL NO. 74 OF WOOD, WIRE AND METAL LATHERS INTERNATIONAL UNION OF CHICAGO, ILLINOIS AND VICINITY; HARRY D. FOLLETT; AND EDWARD D. CHOUINARD, DEFENDANTS

Civil Action 52 C 1639

UNITED STATES OF AMERICA, PLAINTIFF

vs.

EMPLOYING LATHERS ASSOCIATION OF CHICAGO AND VICINITY; ET AL., DEFENDANTS

BLEED THROUGH– POOR COPY

40 Criminal Action No. 52 CR 332

UNITED STATES OF AMERICA, PLAINTIFF

vs.

EMPLOYING PLASTERERS ASSOCIATION OF CHICAGO; JOURNEYMEN PLASTERERS' PROTECTIVE AND BENEVOLENT SOCIETY, LOCAL NO. 5, O. P. & C. F. I. A.; and BYRON WILLIAM DALTON, DEFENDANTS

Civil Action No. 52 C 1640

UNITED STATES OF AMERICA, PLAINTIFF

vs.

EMPLOYING PLASTERERS ASSOCIATION OF CHICAGO; ET AL., DEFENDANTS

MEMORANDUM—Filed July 20, 1953

All five causes under consideration present similar operations in the building trades of the Chicago area which operations are alleged to violate the Sherman Act. A summary analysis of the operations and business practice of the lathing industry can serve to present the operations of the plastering industry because they are similar. Since the legal question in both trades is identical, this discussion relative to the lathing industry is equally applicable to the plastering trade and one opinion will serve for all of the cases at bar.

The defendants, the Employing Lathers Association of Chicago and the labor union known as Local No. 74 of the Wood, Wire and Metal Lathers and its officers, Harry D. Follett and Edward D. Chouinard, were indicted in the case at bar for violation of Sections One and Two of the Sherman Act. All of the de-
41 fendants were residents of the State of Illinois and conducted and carried on their business in the State of Illinois and the acts of conspiracies charged against them were all performed in the State of Illinois.

The indictment charges that there are thirty-six lathing contractors in the Chicago area, an area consisting of the counties of Cook, Du Page and Lake, all three of which are Illinois Counties. All thirty-six of these contractors did about Eight Million Dollars worth of business in 1951. Sixteen of these lathing contractors, who were members of the defendant Employing Lathers Association of Chicago, did about Five Million Dollars worth of work in 1951

BLURRED COPY

in the said three Illinois counties, which amounted to about sixty per cent of all of the lathing business in those counties.

The indictment charged that generally contracts for lathing are executed by building contractors with plastering contractors who agree, under the terms of such contracts, to deliver lathing material and furnish labor for the lathing work required by the building contractor. The plastering contractor then enters into a sub-contract with the lathing contractor for the installation of lathing material in the building being constructed and said lathing material is furnished to said sub-contractors by the plastering contractor.

A major part of all lathing material used in lathing contracts in the said three Illinois counties is sold by manufacturers and dealers from other states to local material dealers in Illinois for resale in Illinois. They, in turn, sell said lathing materials to plastering contractors in Illinois, who then use such materials, or cause lathing contractors to use them, in constructing the
42 work on buildings in Illinois, which buildings remain in Illinois and do not again enter into the stream of inter-state commerce.

There are three methods of delivery used by the building material suppliers who live and conduct their business in Illinois. Those methods are as follows:

FIRST: a substantial amount of lathing materials is purchased from out-of-State sources by building material dealers in response and pursuant to prior orders placed with said dealers by plastering contractors, which is subsequently delivered to the plastering contractors and redelivered to the lathing contractors for installation.

SECOND: A substantial amount of lathing materials is purchased by plastering contractors from building material dealers in Illinois, who have, in turn, secured said material from out-of-State sources in order to meet regular, anticipated demands of plastering contractors. In other words, the purchase is made from building material dealers who stock pile plastering material.

THIRD: A substantial amount of lathing materials is purchased by plastering contractors from building material dealers who order the same from manufacturers and dealers and other sources outside of the State of Illinois, who, in turn, ship the same directly to the job site or place of business of said contractors in the said three Illinois counties for delivery to the lathing contractors for performance of lathing contracting work in said three Illinois counties, commonly known as the Chicago area. It is charged that said lathing materials, so sold, and installed in Illinois, flow in a continuous and uninterrupted stream from the points of origin in states other than the State of Illinois, to the job site for
43 installation and use in the buildings and other structures in Illinois.

BLEED THROUGH— POOR COPY

For the purpose of ruling upon this motion before the Court, all of the allegations stand admitted and every well pleaded fact is assumed to be true.

The plastering contractor is not charged with buying from out-of-State dealers but from building material dealers in Illinois, who are not named in the indictments or complaints herein.

The indictment alleges the existence of an agreement between the Association and Local 74, whereby lathing contractors are excluded from engaging in the area trade, unless they are first approved by Local 74. Such approval is dependent upon a five year union membership, which, in turn, is restricted and reduced pursuant to arbitrary racial and family relationship standards. Disapproved contractors cannot employ union lathers; approved lathing contractors are assigned to designated plastering contractors. It is alleged that this practice has suppressed competition among the lathing contractors in the area, and has effected a monopoly among the few approved lathing contractors, and that it is an unreasonable restraint upon trade and commerce.

There is no allegation of any effect of the alleged intrastate conspiracy upon the interstate market price of the building material involved. There is no allegation of any discrimination or anything that would cause a purchaser to buy building material in Wisconsin or in Chicago or in California. There is no allegation of fact of its effect upon the flow of materials into the State of Illinois. This is wholly a charge of local restraint and monopoly by local labor and a local lathers association, all confined to three counties
44 in the State of Illinois. The alleged restraints do not become associated with the building material or ultimate cost of buildings until after the building materials have been purchased and have come to a state of rest in the State of Illinois, so far as the stream of interstate commerce is concerned.

Whatever restraint there is occurs after all the buying and selling is completed. The flow of commerce is not unlike the flow of water and the statute is designed to prevent a break in the pipes through which interstate commerce flows across state lines and to the consumer. The statute is not designed to apply to the use the consumer makes of the articles of commerce after the consumer has completed his purchase, unless the consumer creates a new product and a new stream of commerce that again crosses state boundary lines.

The Sherman Act was not intended by Congress to interfere with local affairs, even though they might be unfair and malicious and economically unsound. This indictment is brought specifically and is limited to and deals only with the Sherman Act. It is purely conjectural whether the practice with which the defendants are charged may remotely and indirectly affect the flow of commerce.

BLURRED COPY

It might be that it has reduced the number of buildings that are built in three counties in Illinois; it might be it has driven building and industry elsewhere; but that is not alleged in the indictment.

There is no allegation showing these defendants intended to burden interstate commerce by this alleged conspiracy. There is no allegation of fact that it does so burden interstate commerce.

45-46 If this were a situation where portable houses were being built, and there was an additional allegation that after the houses were built, instead of being attached to the real estate and becoming part and parcel of the local Illinois community, where all the acts are alleged to have been committed; and instead of being affixed to real estate remaining in Illinois they were loaded on box cars and sent to other states then there would be such interference with interstate commerce as would support these indictments and complaints herein.

In the light of the authorities, it is the view of this Court indictments and complaints herein do not state an offense or cause of action under the anti-trust laws.

This Court cannot extend the law by interpretation, because, if this Court did extend it in this case, then every step in commerce from the beginning of manufacture to and including the final consumption, and each and every act of every kind thereafter that might affect the quantity or price of articles of commerce would come under the Sherman Act. This Court is bound by the language of the Sherman Act and its subsequent judicial interpretations. It would be presumptuous of a District Court to extend the statute in question to cover the facts alleged in the instant indictment by breaking a new path into the wilderness of commerce law, when the higher Courts have already circumscribed pathways that clearly indicate that the jurisdiction of this Court over interstate commerce ends at the same time and place where interstate commerce itself ends.

Appropriate orders in accord with this opinion will be entered in each case forthwith.

J. S. PERRY,
Judge.

BLEED THROUGH– POOR COPY

47-48 In United States District Court, Northern District of Illinois, Eastern Division

Civil Action 52 C 1639

UNITED STATES OF AMERICA, PLAINTIFF

v.

EMPLOYING LATHERS ASSOCIATION OF CHICAGO AND VICINITY; LOCAL NO. 74 OF WOOD, WIRE AND METAL LATHERS INTERNATIONAL UNION OF CHICAGO, ILLINOIS AND VICINITY; HARRY D. FOLLETT; AND EDWARD D. CHOUINARD, DEFENDANTS

ORDER DISMISSING COMPLAINT—July 20, 1953

This cause came on to be heard upon the motions of all defendants herein, through their respective attorneys, to dismiss the complaint herein for failure to state a claim upon which relief can be granted under the Sherman Anti-Trust Laws. The Court has examined and considered the pleadings and briefs of counsel, filed in this cause. The contention of all defendants that the complaint fails to state a claim upon which relief can be granted under the Sherman Anti-Trust Laws has been considered and sustained.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the complaint herein be dismissed as to all defendants.

ENTER:

J. S. PERRY,
Judge.

July 20, 1953.

49-50 In United States District Court

[Title omitted]

PETITION FOR APPEAL—Filed September 18, 1953

The United States of America, plaintiff in the above-entitled cause, considering itself aggrieved by the final decree of this Court entered on the twentieth day of July, 1953, does hereby pray an appeal from said final decree to the Supreme Court of the United States. Pursuant to Rule 12 of the Rules of the Supreme Court, the plaintiff presents to this Court herewith a statement showing the basis of jurisdiction of the Supreme Court to entertain an appeal in this cause.

The particulars wherein the plaintiff considers the order erroneous are set forth in the assignment of errors and prayer for reversal accompanying this petition and to which reference is hereby made.

The plaintiff prays that its appeal may be allowed and that cita-

BLURRED COPY

tion be issued as provided by law, and that a transcript of the record, proceedings, and documents upon which said final decree was based, duly authenticated, be sent to the Supreme Court of the United States under the rules of said Court in such cases made and provided.

STANLEY N. BARNES,
Assistant Attorney General.
EARL A. JINKINSON,
Special Assistant to the Attorney General.

Dated this 18th day of September, 1953.

51-54 In United States District Court

[Title omitted]

ORDER ALLOWING APPEAL—September 18, 1953

In the above-entitled cause, the United States of America, plaintiff, having made and filed its petition praying an appeal to the Supreme Court of the United States from the final decree of this Court in this cause entered on the twentieth day of July, 1953, and having also made and filed its petition for appeal, assignment of errors and prayed for reversal, and statement of jurisdiction, and having in all respects conformed to the statutes and rules in such cases made and provided,

IT IS THEREFORE ORDERED AND ADJUDGED

That the appeal be and the same is hereby allowed as prayed for.

J. S. PERRY,
United States District Judge.

Dated this 18th day of September, 1953.

55 In United States District Court

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed September 18, 1953

The United States of America, plaintiff in the above-entitled cause, in connection with its petition for appeal to the Supreme Court of the United States, hereby assigns error to the record and proceedings and the entry of the final judgment of the district court on July 20, 1953, in the above-entitled cause, and says that in the entry of the final judgment the district court committed error to the prejudice of the plaintiff in the following particulars:

1. The court erred in holding that the allegations of the complaint do not show a restraint or monopolization of interstate commerce.

BLEED THROUGH– POOR COPY

2. The court erred in holding that, under the allegations of the complaint, the conspiracy to restrain and monopolize which is set forth operated only upon commerce which is intrastate.

3. The court erred in adjudging that the complaint fails to state a claim upon which relief can be granted.

4. The court erred in entering judgment dismissing the complaint.

Wherefore, plaintiff prays that the final judgment of the district court may be reversed to the extent that it is inconsistent
56-92 with the errors herein assigned by the plaintiff, and for such other and fit relief as to the court may seem just and proper.

STANLEY N. BARNES,
Assistant Attorney General.
EARL A. JINKINSON,
Special Assistant to the Attorney General.

Dated this 18th day of September, 1953.

93-97 STATEMENT CALLING ATTENTION TO THE PROVISIONS OF SUPREME COURT RULE 12(3) (omitted in printing)

98-99 PRAECIPE (omitted in printing)

100 Clerk's Certificate to foregoing transcript omitted in printing.

101-102 In the Supreme Court of the United States
October Term, 1953

No. 439

UNITED STATES OF AMERICA, APPELLANT

v.

EMPLOYING LATHERS ASSOCIATION OF CHICAGO AND VICINITY, ET AL.

On Appeal from the United States District Court for the Northern District of Illinois

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed November 4, 1953

a. Appellant adopts for its statement of points upon which it intends to rely in its appeal to this Court the points contained in its Assignment of Errors heretofore filed.

b. Appellant designates for printing by the Clerk of this Court the entire record in this cause as filed in this Court pursuant to appellant's praecipe to the clerk of the United States District Court for

BLURRED COPY

the Northern District of Illinois, except that Items 8, 10, 11 and 12 of said praecipe may be omitted from printing.

November 4, 1953.

ROBERT L. STERN,
Acting Solicitor General.

103 [File endorsement omitted.]

104 Supreme Court of the United States
October Term, 1953

No. 439

UNITED STATES OF AMERICA, APPELLANT

v.

EMPLOYING LATHERS ASSOCIATION OF CHICAGO AND VICINITY, ETC., ET AL.

Appeal from the United States District Court for the Northern District of California

ORDER NOTING PROBABLE JURISDICTION—November 30, 1953

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

☆ U. S. GOVERNMENT PRINTING OFFICE 1953 202310 671

BLEED THROUGH– POOR COPY

BLURRED COPY

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Civil Action No. 52 C 1639

UNITED STATES OF AMERICA, PLAINTIFF

v.

EMPLOYING LATHERS ASSOCIATION OF CHICAGO AND VICINITY; LOCAL NO. 74 OF WOOD, WIRE AND METAL LATHERS INTERNATIONAL UNION OF CHICAGO, ILLINOIS AND VICINITY; HARRY D. FOLLETT; AND EDWARD D. CHOUINARD, DEFENDANTS

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the district court entered in this cause on July 20, 1953. A petition for appeal is presented to the district court herewith, to wit, on September 18, 1953.

OPINION BELOW

The opinion of the district court for the Northern District of Illinois is not yet reported. A copy of the opinion is attached hereto as Appendix A.[1]

[1] The court's opinion also covers a related civil case (*United States* v. *Employing Plasterers' Association of Chicago, et al.*, Civ. No. 52 C 1640) in which the United States is concurrently

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

United States v. *Women's Sportswear Mfg. Assn.*, 336 U.S. 460;

United States v. *New Wrinkle, Inc.*, 342 U.S. 371.

QUESTION PRESENTED

The complaint charges the defendants with conspiring to limit those who may engage in the business of lathing contracting in the Chicago area, which business consists of furnishing and installing, pursuant to sub-contracts with plastering contractors, lathing materials in buildings. The complaint alleges that the major part of the materials purchased and installed by the lathing contractors in the Chicago area are shipped from outside the state for use in such installation; that substantial quantities of the materials so shipped and installed are purchased by building material dealers in re-

---

petitioning for appeal, and two criminal proceedings, which respectively parallel the two civil cases. The judgments of dismissal in the criminal cases have been appealed to the Court of Appeals for the Seventh Circuit, but these appeals will be held in abeyance pending determination of the civil appeals.

BLEED THROUGH– POOR COPY

sponse to prior orders from plastering contractors, who deliver the materials to the lathing contractors for installation; that substantial quantities of the materials purchased by plastering contractors through building material dealers are shipped from out-of-state sources directly to the job site for delivery to lathing contractors; that the foregoing lathing materials flow in a continuous, uninterrupted stream from outside the state to the places of installation in the Chicago area; that the services performed by lathing contractors are an integral part of, and necessary to, this continuous interstate movement; and that restraint upon and interference with the business of lathing contracting in the Chicago area affects, burdens and restrains this interstate movement.

The question presented is whether such allegations show that the conspiracy charged against the defendants restrained or monopolized commerce which is interstate, so as to bring defendants' conduct within the prohibitions of the Sherman Act.

STATUTE INVOLVED

The pertinent provisions of Sections 1, 2, and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U.S.C. 1, 2, 4) commonly known as the Sherman Act, are as follows:

> Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every

BLURRED COPY

person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine, or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.

* * * * *

Sec. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *

STATEMENT

This is a civil action brought by the United States under Section 4 of the Sherman Act against Employing Lathers Association of Chicago and Vicinity (the "Association"), Local No. 74 of Wood, Wire and Metal Lathers International Union of Chicago and Vicinity ("Local 74"), Harry D. Follett, and Edward D. Chouinard. The Association is an incorporated trade association, organized in Illinois, whose membership consists of 16 lathing contractors doing business in the Chicago area. Local No. 74 is a trade union whose

BLEED THROUGH– POOR COPY

members (approximately 700 journeymen lathers and lathers apprentices) perform substantially all of the lathing work in the Chicago area. Defendants Follett and Chouinard are lathing contractors doing business in the Chicago area, and the former has been president of the defendant Association since about January 1951, and the latter has been a member of the Association's Joint Board of Arbitration.

The complaint charged the defendants with conspiring to restrain interstate commerce in lathing materials shipped from outside the State of Illinois for installation in buildings in the Chicago area, and with conspiring to monopolize such commerce, in violation of Sections 1 and 2 of the Sherman Act.[2] On defendants' motions to dismiss the complaint for failure to state a cause of action, the district court held that the allegations did not show that defendants' conduct had an effect on interstate commerce sufficient to bring their conduct within the reach of the Sherman Act. The court accordingly entered a judgment dismissing the complaint as to all defendants.

The principal allegations of the complaint (admitted by the motions to dismiss) are as follows:[3]

Lathing contractors are independent entrepreneurs who undertake, pursuant to so-called "subcontracts" normally made with plastering contractors, to do the lathing work in a building

[2] Lathing materials installed by lathing contractors include gypsum lath, metal lath, cornerites, corner beads, channel irons and tie-wire (compl., par. 11).

[3] A copy of the complaint is attached hereto as Appendix B.

BLURRED COPY

(par. 6). They furnish the labor and part of the necessary lathing materials (the remaining materials being furnished by the plastering contractor), and they employ journeymen and apprentice lathers to perform the actual task of lathing (*ibid.*). In 1951, the 16 members of the Association [4] did over 60% of the lathing contracting business in the Chicago area, and the dollar volume of their business exceeded $5,000,000 (pars. 9, 10).

In most of the building construction in the Chicago area, plastering contractors enter into contracts with general contractors or building owners to perform the lathing and plastering work. They directly undertake the plastering work, but in most instances make a subcontract with a lathing contractor for installing the lathing materials, which they furnish to the lathing contractor. (Par. 8)

Lathing materials which the lathing contractors install are customarily purchased from building material dealers, who purchase the materials from out-of-state sources for resale to plastering contractors, who in turn deliver the materials to lathing contractors (par. 12). Substantial quantities of these purchases by building material dealers are made "to meet the regular anticipated demands" of plastering contractors, and materials so purchased "move in a continuous flow in interstate commerce" from out-of-state sources to the lathing contractors for installation (par. 13). Substantial

---

[4] There are approximately 36 lathing contractors in the Chicago area (par. 9).

BLEED THROUGH– POOR COPY

quantities of lathing materials purchased by plastering contractors through dealers are shipped from points outside the state directly to the "job site" or to the plastering contractor's place of business for delivery to the lathing contractor for installation, and these materials also "flow in a continuous, uninterrupted stream from the points of origin * * * to the job site for installation" (par. 14).

Lathing contractors are "conduits" through which lathing materials shipped from outside the State of Illinois "are applied to their intended use" in the construction of buildings in the Chicago area. The lathing operation is an integral part of the building construction industry, which in the Chicago area had a value of about $500,000,000 in 1951, and lathing work is necessary to the completion of various other building operations, including plastering. Any restraint upon or interference with the performance of lathing work in the Chicago area restrains, affects and burdens the interstate flow of lathing materials used in the construction of buildings in that area. (Pars. 15-18)

For many years the defendants have been parties to a conspiracy to suppress competition among lathing contractors in the Chicago area and to restrict and exclude persons from engaging in this business, in restraint of interstate commerce in lathing materials, and to monopolize the interstate commerce incident to installation of these materials in buildings work in the Chicago area (par.

BLURRED COPY

19). As a part of this conspiracy, the defendants have agreed:

(a) to restrict and reduce the number of those who may engage in the lathing contracting business by excluding therefrom any person not approved by Local No. 74 and any person who has not been a member of the Local for five years, and by employing arbitrary racial and family-relationship standards to restrict the Local's membership;

(b) to eliminate competition among lathing contractors and to deprive plastering contractors of choice among lathing contractors by assigning designated lathing contractors to particular plastering contractors;

(c) to eliminate competition between lathing contractors and plastering contractors by freezing and reducing the number of plastering contractors permitted to employ members of Local No. 74; and

(d) that the Association make money payments to officers of Local No. 74 to induce them to use the power of the local in furtherance of defendants' conspiracy (par. 20).

In more detail, the conspiracy, in certain of its aspects, was carried out as follows:

Local 74, in curtailing the number of persons eligible to become members and to qualify as lathing contractors, admitted to membership as apprentices only relatives of its existing journeymen members, refused to permit any Negro to become an apprentice, and denied membership as journeymen lathers to Negro members of other locals of

BLEED THROUGH– POOR COPY

the International Union with which Local 74 is affiliated (par. 25).

To induce Local 74 to effectuate the conspiracy to restrict competition in the lathing business, the Association employed the Local's president at a substantial salary to act as managing director of a foundation established and financed by Chicago area lathing contractors for the purported purpose of promoting the lathing industry, made 75% of the Association dues available for payment to officers of Local 74, and designated the Association's promotion manager to make money payments to officers and business agents of the Local (par. 24).

Although prior to the conspiracy a number of plastering contractors had employed members of Local 74 to perform lathing work, with the inception of the conspiracy no additional plastering contractor was permitted to hire such members, with the result that at present only seven out of approximately 140 union plastering contractors in the Chicago area may directly employ journeymen lathers and the other 130 odd plastering contractors must subcontract their lathing work to lathing contractors (par. 23).

For many years each lathing contractor has registered with Local 74 the plastering contractor or contractors with whom he entered into lathing subcontracts, and all lathing contractors refrained from soliciting the business of a plastering contractor whose name had been registered by another lathing contractor (par. 26). The effect of this "assignment" plan was that no plastering contractor could

BLURRED COPY

obtain competitive bids from, or enter into subcontracts with, two or more lathing contractors (*ibid.*). Furthermore, a dissatisfied plastering contractor could not change its lathing subcontractor without securing the approval of Local 74, which approval was frequently denied (par. 27). In 1950, operation of this assignment plan became a disputed issue between plastering contractors and Local 74, and the Local then agreed to permit plastering contractors to obtain bids from and make contracts with more than one lathing contractor (par. 28). Shortly thereafter, however, the defendants agreed to continue the "registration" and "assignment" plan under the sponsorship of the Association (*ibid.*) Each number registered with the Association the plastering contractors whose accounts it "claimed", and it was agreed that no member would solicit or perform lathing contracts for a plastering contractor registered with the Association as a "recognized" account of another lathing contractor unless the latter consented to such competition (*ibid.*).

The conspiracy had the following effects among others: Competition among lathing contractors in the Chicago area has been restrained and the right to enter this business thwarted; the number of lathing contractors in this area has been reduced from about 95 in 1925 to about 36; the right to hire union journeymen lathers has been restricted; the cost of building construction in the Chicago area has been artificially enhanced; and interstate com-

BLEED THROUGH– POOR COPY

merce in lathing and related building materials has been unlawfully restrained (par. 29).

THE QUESTION IS SUBSTANTIAL

We submit that the district court, in holding the complaint insufficient to show restraint of interstate commerce, ignored various pertinent allegations, and also employed criteria which are in conflict with principles established by this Court. The unduly restrictive concept of the scope of the Sherman Act reflected in the district court's decision bears upon the Act's application to the many varying situations in which acts done within a state operate to thwart, burden or obstruct a flow of goods from without the state. The decision below is thus of general significance. Furthermore, this Court has never directly passed upon the question whether restrictive competitive practices on the part of those engaged in the building industry come within the reach of the Sherman Act. Since there is reason to believe that in many areas this industry is plagued by limitations on competition which the Sherman Act plainly bans provided interstate commerce "feels the pinch," the decision rendered on this appeal (and the related appeal in the *Plasterers Association* case) may be of wide economic import.

The court below, in concluding that the complaint charged only "local restraint and monopoly," stated, *inter alia,* that the plastering contractors are not charged with buying from "out-of-state dealers"; that the alleged restraints do not im-

BLURRED COPY

pinge upon building materials until they have "come to a state of rest in the State of Illinois," and "after all the buying and selling is completed"; and that there is no allegation of the effect of the conspiracy upon "interstate market price" or upon the "flow of materials into the State of Illinois," and no allegation that the defendants "intended to burden interstate commerce" or that their conspiracy does burden such commerce.

The complaint alleges that substantial quantities of the lathing materials installed in buildings in the Chicago area move in a continuous and uninterrupted flow from outside the state to those who perform the work of installation. This is a "statement of ultimate fact." *United States* v. *Chrysler Corp. Parts Wholesalers,* 180 F. 2d 557, 559 (C. A. 9).[5] The building or buildings in which the materials are to be installed are the destined end of the interstate journey,[6] and an interstate movement, once begun, continues at least until it "reaches the point where the parties have originally intended that the movement should finally end." *Binderup* v. *Pathe Exchange, Inc.,* 263 U. S. 291, 309. While lathing materials usually pass through the hands of building material dealers before reaching the

[5] In that case the sole issue before the appellate court was whether the allegations of the indictment showed that the conspiracy which was charged had a sufficiently close relation to interstate commerce to bring the conspiracy within the prohibitions of the Sherman Act.

[6] The materials are purchased for this end by plastering contractors, and if the plastering contractor had subcontracted the lathing work to a lathing contractor, the materials are delivered to such contractor on their receipt by the purchasing plastering contractor.

BLEED THROUGH= POOR COPY

ultimate purchaser, the interstate movement is not brought to an end by this break in the physical continuity of transit. Cf. *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 569.

But in this case it is not necessary to determine the precise point, under the facts alleged, at which interstate commerce in lathing materials comes to an end. It is well settled that restraints operating immediately upon operations which are intrastate violate the Sherman Act "if the necessary effect is to stifle or restrain commerce among the states"; in that event "it does not matter how local the operation which applies the squeeze." *United States* v. *Women's Sportswear Mfg. Association*, 336 U. S. 460, 464. Where there is a regular inflow of goods to meet an established demand, interference with those engaged in local distribution directly incident to the incoming flow illegally restrains the incoming interstate commerce and violates the Sherman Act. *Local 167* v. *United States*, 291 U. S. 293, 297. The facts in the instant case are similar to those held to show a violation of the Sherman Act in *United States* v. *General Motors Corp.*, 121 F. 2d 376, 401-402, (C.A. 7), certiorari denied, 314 U. S. 618, where the court held that restraint upon the movement of cars from automobile dealers to members of the consuming public "necessarily" affected the antecedent interstate movement of cars from the factory to the dealer.

The complaint alleges (par. 18) that restraint upon and interference with the performance of lathing work in the Chicago area "necessarily and

BLURRED COPY

directly restrains and affects the interstate flow of lathing materials" and constitutes "a direct and substantial burden and restraint upon the interstate flow" of these materials. These allegations are more specific than the effect allegations held to be adequate in *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Company,* 334 U.S. 219, 226. Moreover, in the present case there are pertinent supplementary allegations. It appears from the facts set forth that lathing operations are essential to continuance of an interstate movement in lathing materials which is both regular and substantial. It further appears that defendants, by their conspiracy, limited and controlled lathing operations. On the facts alleged, defendants excluded from these operations all but a small minority of plastering contractors; required all other plastering contractors (some 95% of the total) to subcontract this work to lathing contractors; eliminated all competition for such subcontractors by permitting each plastering contractor to deal with only a particular, designated lathing contractor;[7] and limited the number of lathing contractors.

Congress, in the Sherman Act, fully exercised its commerce power. *United States* v. *Frankfort Distilleries, Inc.,* 324 U. S. 293, 298. It is therefore clear that, upon appropriate allegations, the Sherman Act reaches the conduct charged in the instant case. The commerce power authorizes Congress to

[7] In the *Women's Sportswear* case, *supra,* the limitation on competition was much less drastic since it merely confined jobbers to a choice among the stitching contractors who were members in good standing of the defendant Association.

BLEED THROUGH– POOR COPY

prohibit interference with the carrying out of a single contract to do the electrical work in a building if the contractor annually purchases $55,000 of raw materials from outside the state. *National Labor Relations Board* v. *Denver Bldg. & Const. Trades Council,* 341 U. S. 675, 683-684.

We note, finally, that since the pleadings charge conspiracy between a labor union and a non-labor group (the Association and various lathing contractors), defendants' acts are not within labor exemptions given by the Clayton Act. *Allen Bradley Co.* v. *Local Union No. 3,* 325 U.S. 797.

We submit that the question presented by this appeal is substantial and of public importance.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.

BLURRED COPY

APPENDIX A

Filed July 20, 1953

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action No. 53 C 125

JOSEPH HOWARD, BERNARD HOWARD and PAUL HUGH, on their behalf, and on behalf of all those persons similarly situated, PLAINTIFFS

vs.

LOCAL 74 of the WOOD, WIRE AND METAL LATHERS, INTERNATIONAL UNION OF CHICAGO, ILLINOIS AND VICINITY; ELMER LINDSAY, Personally and as President of Local 74; WILLIAM EBY, Personally and as Financial Secretary-Treasurer of Local 74; WOOD, WIRE AND METAL LATHERS INTERNATIONAL UNION, A. F. OF L.; WILLIAM MCSORELY, Personally and as General President of Wood, Wire and Metal Lathers A. F. of L.; EMPLOYING LATHERS ASSOCIATION OF CHICAGO AND VICINITY, an Illinois corporation; HARVEY D. FOLLETT; EDWARD D. CHOUINARD, DEFENDANTS

Criminal Action No. 52 CR 331

UNITED STATES OF AMERICA, PLAINTIFF

vs.

EMPLOYING LATHERS ASSOCIATION OF CHICAGO AND VICINITY; LOCAL NO. 74 OF WOOD, WIRE AND METAL LATHERS INTERNATIONAL UNION OF CHICAGO, ILLINOIS AND VICINITY; HARRY D. FOLLETT; AND EDWARD D. CHOUINARD, DEFENDANTS

BLEED THROUGH– POOR COPY

Civil Action 52 C 1639

UNITED STATES OF AMERICA, PLAINTIFF

vs.

EMPLOYING LATHERS ASSOCIATION OF CHICAGO AND VICINITY; ET AL., DEFENDANTS

Criminal Action No. 52 CR 332

UNITED STATES OF AMERICA, PLAINTIFF

vs.

EMPLOYING PLASTERERS ASSOCIATION OF CHICAGO; JOURNEYMEN PLASTERERS' PROTECTIVE AND BENEVOLENT SOCIETY, LOCAL NO. 5, O. P. & C. F. I. A.; AND BYRON WILLIAM DALTON, DEFENDANTS

Civil Action No. 52 C 1640

UNITED STATES OF AMERICA, PLAINTIFF

vs.

EMPLOYING PLASTERERS ASSOCIATION OF CHICAGO; ET AL., DEFENDANTS

MEMORANDUM

All five causes under consideration present similar operations in the building trades of the Chicago area, which operations are alleged to violate the Sherman Act. A summary analysis of the operations and business practice of the lathing industry can serve to present the operations of the plastering industry because they are similar. Since the legal question in both trades is identical, this discussion relative to the lathing industry is equally applicable to the plastering trade and one opinion will serve for all of the cases at bar.

BLURRED COPY

The defendants, the Employing Lathers Association of Chicago and the labor union known as Local No. 74 of the Wood, Wire and Metal Lathers and its officers, Harry D. Follett and Edward D. Chouinard, were indicted in the case at bar for violation of Sections One and Two of the Sherman Act. All of the defendants were residents of the State of Illinois and conducted and carried on their business in the State of Illinois and the acts of conspiracies charged against them were all performed in the State of Illinois.

The indictment charges that there are thirty-six lathing contractors in the Chicago area, an area consisting of the counties of Cook, Du Page and Lake, all three of which are Illinois counties. All thirty-six of these contractors did about Eight Million Dollars worth of business in 1951. Sixteen of these lathing contractors, who were members of the defendant Employing Lathers Association of Chicago, did about Five Million Dollars worth of work in 1951 in the said three Illinois counties, which amounted to about sixty per cent of all of the lathing business in those counties.

The indictment charged that generally contracts for lathing are executed by building contractors with plastering contractors who agree, under the terms of such contracts, to deliver lathing material and furnish labor for the lathing work required by the building contractor. The plastering contractor then enters into a sub-contract with the lathing contractor for the installation of lathing material in the building being constructed and said lathing material is furnished to said sub-contractors by the plastering contractor.

BLEED THROUGH– POOR COPY

A major part of all lathing material used in lathing contracts in the said three Illinois counties is sold by manufacturers and dealers from other states to local material dealers in Illinois for resale in Illinois. They, in turn, sell said lathing materials to plastering contractors in Illinois, who then use such materials, or cause lathing contractors to use them, in constructing the work on buildings in Illinois, which buildings remain in Illinois and do not again enter into the stream of interstate commerce.

There are three methods of delivery used by the building material suppliers who live and conduct their business in Illinois. Those methods are as follows:

First: A substantial amount of lathing materials is purchased from out-of-State sources by building material dealers in response and pursuant to prior orders placed with said dealers by plastering contractors, which is subsequently delivered to the plastering contractors and redelivered to the lathing contractors for installation.

Second: A substantial amount of lathing materials is purchased by plastering contractors from building material dealers in Illinois, who have, in turn, secured said material from out-of-State sources in order to meet regular, anticipated demands of plastering contractors. In other words, the purchase is made from building material dealers who stock pile plastering material.

Third: A substantial amount of lathing materials is purchased by plastering contractors from building material dealers who order the same from

BLURRED COPY

manufacturers and dealers and other sources outside of the State of Illinois, who, in turn, ship the same directly to the job site or place of business of said contractors in the said three Illinois counties for delivery to the lathing contractors for performance of lathing contracting work in said three Illinois counties, commonly known as the Chicago area. It is charged that said lathing materials, so sold, and installed in Illinois, flow in a continuous and uninterrupted stream from the points of origin in states other than the State of Illinois, to the job site for installation and use in the buildings and other structures in Illinois.

For the purpose of ruling upon this motion before the Court, all of the allegations stand admitted and every well pleaded fact is assumed to be true.

The plastering contractor is not charged with buying from out-of-State dealers but from building material dealers in Illinois, who are not named in the indictments or complaints herein.

The indictment alleges the existence of an agreement between the Association and Local 74, whereby lathing contractors are excluded from engaging in the area trade, unless they are first approved by Local 74. Such approval is dependent upon a five year union membership, which, in turn, is restricted and reduced pursuant to arbitrary racial and family relationship standards. Disapproved contractors cannot employ union lathers; approved lathing contractors are assigned to designated plastering contractors. It is alleged that this practice has suppressed competition among the lathing contractors in the area, and has effected

BLEED THROUGH– POOR COPY

a monopoly among the few approved lathing contractors, and that it is an unreasonable restraint upon trade and commerce.

There is no allegation of any effect of the alleged intrastate conspiracy upon the interstate market price of the building material involved. There is no allegation of any discrimination or anything that would cause a purchaser to buy building material in Wisconsin or in Chicago or in California. There is no allegation of fact of its effect upon the flow of materials into the State of Illinois. This is wholly a charge of local restraint and monopoly by local labor and a local lathers association, all confined to three counties in the State of Illinois. The alleged restraints do not become associated with the building material or ultimate cost of buildings until after the building materials have been purchased and have come to a state of rest in the State of Illinois, so far as the stream interstate commerce is concerned.

Whatever restraint there is occurs after all the buying and selling is completed. The flow of commerce is not unlike the flow of water and the statute is designed to prevent a break in the pipes through which interstate commerce flows across state lines and to the consumer. The statute is not designed to apply to the use the consumer makes of the articles of commerce after the consumer has completed his purchase, unless the consumer creates a new product and a new stream of commerce that again crosses state boundary lines.

The Sherman Act was not intended by Congress to interfere with local affairs, even though they might be unfair and malicious and economically unsound. This indictment is brought specifically

BLURRED COPY

and is limited to and deals only with the Sherman Act. It is purely conjectural whether the practice with which the defendants are charged may remotely and indirectly affect the flow of commerce. It might be that it has reduced the number of buildings that are built in three counties in Illinois; it might be it has driven building and industry elsewhere; but that is not alleged in the indictment.

There is no allegation showing these defendants intended to burden interstate commerce by this alleged conspiracy. There is no allegation of fact that it does so burden interstate commerce.

If this were a situation where portable houses were being built, and there was an additional allegation that after the houses were built, instead of being attached to the real estate and becoming part and parcel of the local Illinois community, where all the acts are alleged to have been committed; and instead of being affixed to real estate remaining in Illinois they were loaded on box cars and sent to other states then there would be such interference with interstate commerce as would support these indictments and complaints herein.

In the light of the authorities, it is the view of this Court indictments and complaints herein do not state an offense or cause of action under the anti-trust laws.

This Court cannot extend the law by interpretation, because, if this Court did extend it in this case, then every step in commerce from the beginning of manufacture to and including the final consumption, and each and every act of every kind thereafter that might affect the quantity or price

BLEED THROUGH– POOR COPY

of articles of commerce would come under the Sherman Act. This Court is bound by the language of the Sherman Act and its subsequent judicial interpretations. It would be presumptuous of a District Court to extend the statute in question to cover the facts alleged in the instant indictment by breaking a new path into the wilderness of commerce law, when the higher Courts have already circumscribed pathways that clearly indicate that the jurisdiction of this Court over interstate commerce ends at the same time and place where interstate commerce itself ends.

Appropriate orders in accord with this opinion will be entered in each case forthwith.

(S.) J. S. PERRY,
Judge.

BLURRED COPY

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action No. 52 C 1639

Equitable Relief Sought Filed: July 31, 1952

UNITED STATES OF AMERICA, PLAINTIFF

v.

EMPLOYING LATHERS ASSOCIATION OF CHICAGO AND VICINITY; LOCAL NO. 74 OF WOOD, WIRE AND METAL LATHERS INTERNATIONAL UNION OF CHICAGO, ILLINOIS AND VICINITY; HARRY D. FOLLETT; AND EDWARD D. CHOUINARD, DEFENDANTS

COMPLAINT

The United States of America, by its attorneys, acting under the direction of the Attorney General, brings this complaint against the defendants named herein, and alleges as follows:

I

JURISDICTION AND VENUE

1. This complaint is filed and these proceedings are instituted against the defendants named herein under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended (15 U.S.C. Sec. 4), entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, in order to prevent and restrain continuing

BLEED THROUGH– POOR COPY

violations by the defendants, as hereinafter alleged, of Sections 1 and 2 of that Act (15 U.S.C. Secs. 1, 2).

2. The defendants Employing Lathers Association of Chicago and Vicinity, Local No. 74 of Wood, Wire and Metal Lathers International Union of Chicago, Illinois and Vicinity, Harry D. Follett, and Edward D. Chouinard, as hereinafter alleged, maintain offices and transact business within the Eastern Division of the Northern District of Illinois and are found therein.

II

Defendants

3. The following are named as defendants herein:

(a) Employing Lathers Association of Chicago and Vicinity, a corporation organized and existing under the General Not-for-Profit Corporation Act of the State of Illinois. Said corporation, sometimes hereinafter referred to as the "Association," is a trade association whose membership consists of 16 lathing contractors doing business in the Chicago area. The Association transacts business in Chicago, Illinois, and its records are kept by its secretary at 3354 N. Long Avenue, Chicago, Illinois. The Association, which was incorporated in 1945, is the successor to prior unincorporated associations of lathing contractors located in the Chicago area.

(b) Local No. 74 of the Wood, Wire and Metal Lathers International Union of Chicago,

BLURRED COPY

Illinois and Vicinity, sometimes hereinafter referred to as "Local 74." The said Local 74 is an unincorporated trade union or association of individuals chartered by and operating under the authority of the Wood, Wire and Metal Lathers International Union. Its membership is composed of approximately 700 journeymen lathers and apprentices, who perform practically all of the lathing work in the Chicago area. It has its place of business and offices at 205 W. Wacker Drive, Chicago, Illinois.

(c) Harry D. Follett, an individual residing at 1015 N. Lombard Avenue, Oak Park, Illinois. The said Harry D. Follett is a lathing contractor doing business in the Chicago area, has been president of the defendant Association from approximately January 1951 to the date of the filing of this complaint, and was vice-president of the defendant Association from approximately August 1945 to January 1951.

(d) Edward D. Chouinard, an individual residing at 8028 S. Luella Avenue, Chicago, Illinois. The said defendant Edward D. Chouinard is a lathing contractor, has been a member of the Association for many years, and has been a member of its Joint Board of Arbitration.

4. Whenever in this complaint it is alleged that any corporate defendant or unincorporated association did any act or thing, such allegation shall be deemed to mean that such act was done by the of-

BLEED THROUGH– POOR COPY

ficers, employees, agents, or representatives of such corporate defendant or unincorporated association.

III

Co-Conspirators

5. Numerous lathing contractors, including those who are members of the defendant Association, were co-conspirators in the combination and conspiracy hereinafter alleged.

IV

Definitions

6. As used herein, the term "lathing contractor" means an independent entrepreneur engaged in the business of entering into and performing so-called "subcontracts" for the lathing of buildings. Such subcontracts are normally made with plastering contractors. Lathing contractors customarily enter into contracts based upon the furnishing of labor and part of the lathing materials by the lathing contractor, and the furnishing of the remainder of the lathing materials by the plastering contractor. Lathing contractors function as managers and owners of businesses and employ journeymen and apprentice lathers to perform the lathing operations which precede the application of the coats of plaster.

7. As used herein, the term "Chicago area" means that area within the recognized jurisdiction of Local 74. Such area includes most of Cook County and portions of Du Page and Lake Counties, Illinois.

BLURRED COPY

V

Nature of Trade and Commerce

8. In most building construction in the Chicago area, contracts for lathing and plastering operations are generally executed with plastering contractors, who agree therein to furnish the plastering and lathing materials and to have the same installed. In performing said contracts, the plastering contractors sell and distribute plastering and lathing materials, and perform themselves the plastering work. In most instances, the plastering contractor enters into a subcontract with a lathing contractor for the installation of lathing materials in the building, said lathing materials being furnished by the plastering contractor to the lathing contractor. The contract of the plastering contractor for the sale and installation of plastering and lathing materials is not performed until the lathing materials are installed by the lathing contractor. The installation of lathing materials by lathing contractors is essential to the performance of contracts by plastering contractors for the sale of said materials to general contractors or building owners.

9. There are approximately 36 lathing contractors in the Chicago area who are engaged in the business of performing lathing contracts for the installation of lathing materials in buildings. The dollar volume of the lathing contracts entered into by the lathing contractors in the Chicago area in 1951 amounted to more than $8,000,000.

10. Approximately 16 of the above referred to lathing contractors in the Chicago area are mem-

BLEED THROUGH– POOR COPY

bers of the defendant Association. The dollar volume of lathing contracts entered into by lathing contractors who are members of the defendant Association totaled in excess of $5,000,000 in 1951, or over 60% of the total amount of lathing contracting business in the Chicago area in that year.

11. The materials, herein referred to as lathing materials, used and installed by lathing contractors in the performance of lathing contracts, include gypsum lath, metal lath, cornerites, corner beads, channel irons, and tie-wire. A major part of all of said lathing materials used in the performance of lathing contracts in the Chicago area is produced in States other than the State of Illinois, and is shipped in interstate commerce from said States into the Chicago area for sale and installation therein.

12. Customarily, the lathing materials installed by lathing contractors in the Chicago area are purchased from building material dealers in the area, who purchase said materials from out-of-State sources for resale to plastering contractors, who in turn deliver the same to lathing contractors for installation. Substantial quantities of said lathing materials are purchased from out-of-State sources by said building material dealers in response and pursuant to prior orders placed with said dealers by plastering contractors, and, upon receipt of said materials from said out-of-State sources, said materials are then delivered to the plastering contractors who ordered the same, and are then delivered by said plastering contractors to the lathing contractors for installation.

13. Substantial quantities of lathing materials purchased by plastering contractors in the Chicago

BLURRED COPY

area are obtained from building material dealers who have in turn secured said materials from out-of-State sources in order to meet the regular anticipated demand of said plastering contractors. Said lathing materials purchased by such dealers from out-of-State sources to meet the regular anticipated demands of said plastering contractors move in a continuous flow in interstate commerce from said out-of-State sources through the dealers and plastering contractors to the lathing contractors for installation.

14. Substantial quantities of lathing materials purchased by plastering contractors through building material dealers are obtained from manufacturers, dealers, or other sources outside the State of Illinois who ship directly to the job site or place of business of said contractors in the Chicago area for delivery to the lathing contractor for the performance of lathing contracting work. Said lathing materials so sold and installed in the Chicago area flow in a continuous, uninterrupted stream from the points of origin in States other than the State of Illinois to the job site for installation and use in buildings and other structures in the Chicago area.

15. Consumers of lathing materials ordinarily do not install said materials, and this service is customarily performed by lathing contractors, who employ and supervise skilled labor for this purpose. The service performed by lathing contractors in the Chicago area in the installation of lathing materials is an integral part of, and necessary to, the movement in interstate commerce of lathing materials which are manufactured in States other than the State of Illinois and which are distributed

BLEED THROUGH– POOR COPY

and installed in the Chicago area. Thus, lathing contractors are conduits through which lathing materials manufactured and shipped from States other than the State of Illinois are applied to their intended use in the construction of buildings in the Chicago area. The function performed by said lathing contractors in the installation of said lathing materials in building is essential to the interstate flow of said materials, since said lathing materials are of no use to the ultimate purchaser until they are installed in buildings. Said lathing materials flow in a continuous stream from their points of origin in States other than Illinois to their final installation and use in buildings in the Chicago area.

16. The lathing operation is an integral part of the building construction industry, which, in the Chicago area in 1951, engaged in new building construction and remodeling to the value of approximately a half billion dollars, and the performance of said lathing operation is necessary to the completion of other building operations including plastering and interior painting and decoration, and the installation of plumbing fixtures, heating and air conditioning outlets and vents, electrical outlets and fixtures, flooring and interior wood trim, and window and door sashes. A substantial part of all of said building materials and appurtenances is produced in States other than Illinois and is sold and shipped in interstate commerce from said States to the Chicago area for distribution and use in buildings in said area.

17. The installation or use in buildings of said building materials and appurtenances is an in-

BLURRED COPY

tegral part of, and necessary to, the movement in interstate commerce of said materials manufactured in States other than the State of Illinois, and which are distributed, sold and installed in the Chicago area. Substantial quantities of said building materials and appurtenances flow in a continuous uninterrupted stream from their points of origin in States other than Illinois to the places of installation and use in buildings in the Chicago area.

18. Any restraint upon or disruption in or interference with the performance of lathing work in the Chicago area necessarily and directly restrains and affects the interstate flow of lathing materials, and also constitutes a direct and substantial burden and restraint upon the interstate flow of all of the hereinbefore referred to building materials and appurtenances entering into the construction of buildings in the Chicago area.

VI

The Combination and Conspiracy

19. For many years past, the exact beginning date to the plaintiff unknown, and continuing to the date of the filing of this complaint, the defendants and their co-conspirators, and others to the plaintiff unknown, have engaged in an unlawful combination and conspiracy to suppress competition among the lathing contractors in the Chicago area, and to restrict and exclude persons from engaging in the lathing contracting business in said area, in unreasonable restraint of the hereinbefore described trade and commerce among the several States, and to monopolize the installation in the

BLEED THROUGH– POOR COPY

Chicago area of lathing materials flowing in interstate commerce as hereinbefore described, in violation of Sections 1 and 2 of the Act of Congress of July 2, 1890 (15 U.S.C. Secs. 1, 2), commonly known as the Sherman Act. Said offenses are continuing and will continue unless the relief hereinafter prayed for in this complaint is granted.

20. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among the defendants, the co-conspirators, and others to the plaintiff unknown, the substantial terms of which have been and are that they agree:

(a) To restrict and reduce the number of lathing contractors permitted to engage in the lathing contracting business by:

(1) Excluding any person from becoming a lathing contractor who has not first secured the approval of Local 74;

(2) Denying the right to become a lathing contractor to any person who has not first been a member of Local 74 for five years;

(3) Denying to any person, who has not first obtained the approval of Local 74 to become a lathing contractor, the right to employ members of Local 74;

(4) Restricting and reducing, by arbitrary racial and family relationship standards, the number of apprentice and journeymen lathers accepted into membership in Local 74;

(b) To assign particular plastering contractors to certain designated lathing contractors, thereby eliminating the competition

BLURRED COPY

among lathing contractors for the business of said plastering contractors, and depriving said plastering contractors of their right to choose the lathing contractors with whom they wish to do business;

(c) That the defendants eliminate competition in the lathing field between lathing contractors and plastering contractors by freezing and reducing the number of plastering contractors who are permitted to hire members of Local 74;

(d) That the defendant Association and co-conspirators effectuate payments of money to officers of defendant Local 74 to induce them to utilize the power of that Local in furtherance of the conspiracy.

21. During the period of time covered by this complaint and for the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and their co-conspirators by agreement and concert of action, have done the things which, as hereinbefore alleged, they conspired to do, and more particularly have done, among others, the following acts and things.

22. In furtherance of the conspiracy to restrict competition in the lathing field, the defendant Local 74 has adopted, maintained, and enforced restrictions governing entry into the lathing contracting business in the Chicago area. Thus, Local 74 requires persons desiring to enter the lathing contracting business first to make application to and receive the approval of Local 74 as a prerequisite to entering the business. Persons who have failed to receive the approval of Local 74 have been denied

BLEED THROUGH– POOR COPY

the right to hire Local 74 journeymen lathers and apprentices, and thereby have been excluded from the lathing contracting business in the Chicago area. Local 74 further refuses to consider or approve applications except from persons who have been journeymen members of Local 74 for five years. As a result, no person who has not been a journeyman member of Local 74 is permitted to engage in the lathing contracting business in the Chicago area.

23. Prior to the beginning of this conspiracy, a number of plastering contractors in the Chicago area hired journeymen lathers who were members of Local 74 to perform lathing work rather than subcontract such work to lathing contractors. With the inception of this conspiracy, and in furtherance of it, the defendant Local 74 instituted the practice of refusing to permit additional plastering contractors to hire journeymen lathers. As a result of this practice, there has been a reduction in the number of plastering contractors permitted to hire lathers directly, and at the present time there are only seven union plastering contractors in the Chicago area out of approximately 140 who may thus hire journeymen lathers directly. The remainder must subcontract their lathing to lathing contractors.

24. To encourage Local 74 to effectuate the restriction and reduction of competition in the lathing contracting business, the defendant Association has from time to time paid sums of money to officers of Local 74. The Association made seventy-five per cent of its dues available for such payments, and designated its Promotion Manager to

BLURRED COPY

pay sums of money and other considerations tc officers and business agents of Local 74. The Association furthermore employs the President of Local 74 at a substantial salary to act as Managing Director of a foundation which has been established and is financed by Chicago area lathing contractors for the purported purpose of promoting the lathing industry.

25. Pursuant to the conspiracy charged herein, Local 74 has adopted and maintained restrictive membership rules and policies which curtail the number of persons eligible to become members of Local 74 and to qualify as lathing contractors. Thus, it restricts admission of apprentices intc membership into Local 74 to those persons who are relatives of journeymen lathers who are already members of Local 74. It has also arbitrarily excluded applicants of the negro race from becoming apprentices or from being admitted to membership as journeymen lathers. Local 74 has alsc refused to accept into membership journeymen lathers of the negro race who have attempted to transfer memberships to Local 74 from out-of-State lathers' unions affiliated with the same International Lathers Union with which Local 74 is affiliated.

26. For many years each lathing contractor registered with Local 74 the plastering contractor or contractors for whom such lathing contractor performed lathing subcontracts. Upon such registration, it was understood by all other lathing contractors that the registered plastering contractors were "assigned" to the lathing contractor who had registered their names. Thereafter, all other lath-

BLEED THROUGH– POOR COPY

ing contractors in the Chicago area refrained from soliciting the business of such "assigned" plastering contractors and refrained from submitting bids to, or performing lathing work for, such assigned plastering contractor. The operation of the above described "assignment" plan resulted in each plastering contractor in the Chicago area being confined to one lathing contractor and being denied the right to obtain competitive bids from two or more lathing contractors. Furthermore, each plastering contractor was prohibited from entering into subcontracts with more than one lathing contractor.

27. Under the operation of the foregoing registration system, whenever a plastering contractor sought to change its lathing subcontractor, such plastering contractor had first to make application to, and receive the approval of, defendant Local 74. In many instances, Local 74 denied to such dissatisfied plastering contractors the right to change lathing subcontractors. As a result of such plan of "registration" and "assignment," competition among lathing contractors was suppressed and plastering contractors were denied the right to enter freely into business arrangements with lathing contractors of their choice.

28. Operation of the above described plan of "assignment" caused dissatisfaction among plastering contractors and constituted one of the issues in dispute between plastering contractors and Local 74 during the fall of 1950. As a result of this dispute, Local 74 entered into an agreement with the plastering contractors recognizing the right of such plastering contractors to obtain bids from

BLURRED COPY

more than one lathing contractor and to contract for lathing work with more than one lathing contractor. Shortly thereafter, however, the defendants reached a mutual understanding whereby the so-called "registration" and "assignment" plan was to be continued under the sponsorship of the defendant Association rather than of Local 74. Thus, the members of the Association agreed not to solicit or perform lathing contracts for a plastering contractor who had been "registered" with the defendant Association by another lathing contractor as his "recognized" account, unless such other lathing contractor consented to such competition. Each member of the defendant Association agreed to "register" with the Secretary of the Association the names of those plastering contractors "claimed" by such lathing contractor as his accounts.

VII

Effects of the Conspiracy

29. The effects of the aforesaid combination and conspiracy, among others, have been as follows:

(a) The number of lathing contractors in the Chicago area has been reduced from approximately 95 in 1925 to approximately 36 at the present time and the right of union contractors to hire union journeymen lathers and apprentices has been unlawfully restrained and impeded;

(b) Competition among lathing contractors in the Chicago area has been unlawfully restrained and the traditional American right of a person to enter into a business of his own

BLEED THROUGH– POOR COPY

choice without hindrance of illegal restraints of trade has been impaired and thwarted;

(c) The cost of building construction in the Chicago area has been artificially and illegally increased;

(d) The public has been denied the benefits in the construction industry in the Chicago area which would result from competition free from the illegal restraints in the lathing phases of the building construction industry;

(e) Interstate trade and commerce in lathing and related building materials has been unlawfully restrained.

PRAYER

WHEREFORE, plaintiff prays:

1. That the Court adjudge and decree that the aforesaid combination and conspiracy entered into by the defendants and all the acts done pursuant thereto constitute an unlawful restraint of interstate trade and commerce in violation of Sections 1 and 2 of the Sherman Act.

2. That the defendants, and each of them, and their directors, officers, and agents, and employees, be enjoined from continuing, renewing, or reviving the unlawful combination and conspiracy hereinbefore alleged, or any combination or conspiracy having a similar purpose or effect.

3. That defendants and each of them be enjoined from requiring persons desiring to enter the lathing contracting business to apply to and secure the approval of Local 74 and that Local 74 be enjoined from adopting or maintaining any policy, rule, or by-law having the purpose or effect of preventing

BLURRED COPY

or restricting any prospective lathing contractor from entering such business; provided, however, that nothing in the judgment entered in this cause shall prevent or prohibit Local 74 from requiring persons who wish to employ Local 74 members to agree to abide by union contract requirements as to wages, hours of employment, and other legitimate terms of working conditions.

4. That the defendant Local 74 be enjoined from adopting, maintaining, or enforcing any rule or restriction having the purpose or effect of preventing or restricting members of Local 74 from engaging in the lathing contracting business.

5. That Local 74 be enjoined from prohibiting, restricting, or preventing any person, including but not limited to any plastering contractor, from employing or hiring members of Local 74 to perform lathing work so long as such person will agree to abide by union contract requirements as to wages, hours of employment, and other legitimate terms of working conditions.

6. That Local 74 be enjoined from continuing, establishing, or maintaining any policy, rule, or requirement relating to admission of journeymen or apprentices into membership in Local 74 which is based upon race, religion, national origin, or family relationship to an existing member of the Local and which may have the effect of limiting the number of those eligible to enter the lathing contracting business.

7. That the defendants, and each of them, be enjoined from establishing, continuing, maintaining, fostering, or participating in any plan, program, or understanding to allocate, register, or

BLEED THROUGH– POOR COPY

"assign" plastering contractors or lathing jobs to particular lathing contractors.

8. That the Court enter such orders with respect to the rules, by-laws, and charter of the defendant Association and of the defendant Local 74 as is necessary to prevent the restrictive practices herein alleged and to carry out and enforce the terms of the judgment entered in this cause.

9. That the plaintiff have such other, further, and different relief as the nature of the case may require and the Court may deem appropriate in the premises.

10. That the plaintiff recover the costs of this suit.

(S.) JAMES P. MCGRANERY,
Attorney General.
(S.) NEWELL A. CLAPP,
Acting Assistant Attorney General.
(S.) GEORGE B. HADDOCK,
Special Assistant to the Attorney General.
(S.) OTTO KERNER, JR.,
United States Attorney.
(S.) WILLIS L. HOTCHKISS,
Special Assistant to the Attorney General.
(S.) E. HOUSTON HARSHA,
(S.) HARRY H. FARIS,
(S.) CHARLES W. HOUCHINS,
Trial Attorneys,
Suite 820, 208 South LaSalle Street,
Chicago 4, Illinois,
Central 6-6886.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1953 378479 913

BLURRED COPY

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	3
Statement	3
Specification of errors to be urged	12
Summary of argument	12
Argument:	
The conspiracy set forth in the complaint is in unreasonable restraint of interstate commerce in lathing materials shipped into the Chicago area	14
A. The lathing materials shipped from states other than Illinois remain in interstate commerce until they reach the lathing contractors for whom they are destined	17
B. Even if the movement of the lathing materials "in" interstate commerce ended before they reached the lathing contractors, the conspiracy unreasonably restrains interstate commerce	20
C. Appellees' restrictions on outlets for interstate shipments of lathing materials are restraints on interstate trade, of a kind banned by the Sherman Act	25
Conclusion	32

CITATIONS

Cases:

Apex Hosiery Co. v. *Leader*, 310 U.S. 469	28
Associated Press, Inc. v. *United States*, 326 U.S. 1	28
Binderup v. *Pathe Exchange, Inc.*, 263 U.S. 291	19
Carpenters Union v. *National Labor Relations Board*, 341 U.S. 707	16
Eastern States Retail Lumber Dealers' Assn. v. *United States*, 234 U.S. 600	28
Electrical Workers v. *National Labor Relations Board*, 341 U.S. 694	16
Fashion Originators' Guild v. *Federal Trade Commission*, 312 U.S. 457	28
Illinois Central R.R. v. *Louisiana R.R. Commission*, 236 U.S. 157	19
Industrial Association of San Francisco v. *United States*, 268 U.S. 64	29
Levering & Garrigues Co. v. *Morrin*, 289 U.S. 103	29
Local 167 v. *United States*, 291 U.S. 293	15, 22, 27
Lorain Journal Co. v. *United States*, 342 U.S. 143	14, 27, 28
Mandeville Farms v. *American Crystal Sugar Co.*, 334 U.S. 219	13, 22, 23, 30, 31

BLURRED COPY

Cases—Continued

	Page
Montague & Co. v. *Lowry*, 193 U.S. 38	28
National Labor Relations Board v. *Denver Building Council*, 341 U.S. 675	12, 15-16
Polish National Alliance v. *National Labor Relations Board*, 322 U.S. 643	23
Ramsay Co. v. *Bill Posters Assn.*, 260 U.S. 501	31
Standard Oil Co. v. *Federal Trade Commission*, 340 U.S. 231	20
Standard Oil Co. v. *United States*, 337 U.S. 293	4
Standard Sanitary Mfg. Co. v. *United States*, 226 U.S. 20	28
United Brotherhood of Carpenters v. *United States*, 330 U.S. 395	24
United States v. *Associated Marble Companies*, Federal Antitrust Laws, CCH 1952, p. 224	24
United States v. *Central Supply Assn.*, 6 F.R.D. 526	24
United States v. *Chattanooga Chapter, National Electrical Contractors Assn.*, CCH Trade Reg. Serv., ¶ 67,551	24
United States v. *Chrysler Corp. Parts Wholesalers*, 180 F. 2d 557	18
United States v. *Contracting Plasterers' Assn. of Long Beach*, Federal Antitrust Laws, CCH 1952, p. 206	24
United States v. *Crescent Amusement Co.*, 323 U.S. 173	28
United States v. *Detroit Sheet Metal & Roofing Contractors Assn.*, 116 F. Supp. 81	24
United States v. *Employing Plasterers Assn.*, No. 440, this Term	4, 24
United States v. *Frankfort Distilleries, Inc.*, 324 U.S. 293	30
United States v. *Glass Contractors' Assn.*, Federal Antitrust Laws, CCH 1952, p. 219	24
United States v. *Harbor District Lumber Dealers Assn.*, Federal Antitrust Laws, CCH 1952, p. 213	24
United States v. *Las Vegas Merchant Plumbers Assn.*, Federal Antitrust Laws, CCH 1952, p. 409	24
United States v. *Minneapolis Electrical Contractors Assn.*, 99 F. Supp. 75	23
United States v. *Northeast Texas Chapter, National Electrical Contractors Assn.*, 181 F. 2d 30	23
United States v. *Patten*, 226 U.S. 525	28, 29
United States v. *Tile Contractors' Assn. of America*, Federal Antitrust Laws, CCH 1952, p. 222	24
United States v. *Women's Sportwear Mfg. Assn.*, 336 U.S. 460	13, 21, 27
United States v. *Yellow Cab Co.*, 332 U.S. 218	28
Walling v. *Jacksonville Paper Co.*, 317 U.S. 564	18-20
Wickard v. *Filburn*, 317 U.S. 111	31

BLEED THROUGH– POOR COPY

Statute:

Page

Sherman Act, Act of July 2, 1890, 26 Stat. 209, as amended, 15 U.S.C. 1 *et seq.*:

Sec. 1 3
Sec. 4 3

BLURRED COPY

BLEED THROUGH- POOR COPY

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 439

UNITED STATES OF AMERICA, APPELLANT

v.

EMPLOYING LATHERS ASSOCIATION OF CHICAGO AND VICINITY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 21) is not yet reported.

JURISDICTION

The final judgment of the district court was entered on July 20, 1953 (R. 25). The petition for appeal was filed and allowed on September 18, 1953 (R. 25-26). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. 29, as amended by Section 17 of the Act of June 25, 1948,

BLURRED COPY

62 Stat. 869. This Court noted probable jurisdiction of the appeal on November 30, 1953 (R. 28).

QUESTION PRESENTED

The complaint charges a conspiracy to limit those who may engage in the business of contracting to furnish and install lathing materials in buildings constructed in the Chicago area, and to eliminate competition in the making of such contracts. It is alleged that a major part of the materials which lathing contractors supply and install is shipped into the Chicago area from outside the state, with installation in Chicago-area buildings as the intended end of the interstate movement. The complaint further alleges that substantial quantities of these materials, which plastering contractors deliver to lathing contractors after purchase from local building material dealers, are shipped directly to the job site for delivery to lathing contractors, and that the dealers purchase substantial quantities pursuant to prior orders placed with them by plastering contractors. It is alleged that all such materials move in a continuous flow from their out-of-state origins to lathing contractors for installation in buildings in the Chicago area, and that the services performed by these contractors are essential to this interstate flow.

The question presented is whether, upon such allegations, the conspiracy charged against the defendants restrained commerce which is interstate, in violation of Section 1 of the Sherman Act.

BLEED THROUGH– POOR COPY

STATUTE INVOLVED

The Act of July 2, 1890, 26 Stat. 209, known as the Sherman Act, as amended, provides in part as follows:

> Section 1 [as amended by the Act of August 17, 1937, 50 Stat. 693]. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *. [15 U.S.C. 1.]
>
> * * * * *
>
> Sec. 4 [as amended by the Act of March 3, 1911, 36 Stat. 1167]. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * * [15 U.S.C. 4.]

STATEMENT

This is a civil action brought by the United States under Section 4 of the Sherman Act against a trade association whose members are lathing contractors doing business in the Chicago area,[1] a local

[1] The Chicago area comprises most of Cook County and parts of two other Illinois counties (par. 7, R. 3).

BLURRED COPY

trade union with a membership of about 700 journeymen and apprentice lathers "who perform practically all of the lathing work in the Chicago area," and two individual members of the defendant trade association (R. 1-2). The defendant association, the Employing Lathers Association of Chicago and Vicinity, is referred to hereinafter as the Association; the defendant trade union, Local No. 74 of Wood, Wire and Metal Lathers Union of Chicago, Illinois, and Vicinity, will be referred to as Local 74.

The complaint charged the defendants, the present appellees, with conspiring to restrain interstate commerce in lathing materials shipped from outside the State of Illinois for installation in buildings constructed in the Chicago area.[2] The district court sustained defendants' motions to dismiss the complaint for failure to state a cause of action, and entered a judgment of dismissal (R. 25). In the opinion which it filed,[3] the court, with-

[2] While the complaint additionally charged, on the basis of the same allegations of fact, that the defendants had conspired to monopolize interstate commerce in lathing materials in violation of Section 2 of the Act, our argument will be confined to the validity of the primary charge of violation of Section 1. If this charge is sustained and later established by the proof, in the circumstances of this case the United States will be entitled to as broad relief as might be accorded if the charge of violation of Section 2 should also be sustained and established. We therefore deem the validity of the latter charge a matter which need not be pressed and which this Court need not reach. Cf. *Standard Oil Co.* v. *United States*, 337 U. S. 293, 314. If this Court upholds our contentions with respect to Section 1 of the Act, the Government will, after remand of the case to the district court, eliminate the charge of violation of Section 2.

[3] The opinion also covers the complaint in *United States* v. *Employing Plasterers Association of Chicago*, pending on ap-

BLEED THROUGH– POOR COPY

out quoting any allegation or even phrase found in the complaint, construed it as charging only "local restraint and monopoly," and declared that "the stream of interstate commerce" there described came to a halt before the alleged restraints became operative (R. 23). Upon this construction of the complaint, the court concluded that the acts charged against defendants were not banned by the Sherman Act. No decision under the Act was cited by the court. See R. 21-24.

The major facts alleged in the complaint, and admitted for present purposes by the motion to dismiss, are as follows:

In most of the buildings constructed in the Chicago area, the owner or general contractor makes a contract with a plastering contractor under which the latter agrees to furnish and install the plastering and lathing materials (par. 8, R. 3). The plastering contractor ordinarily subcontracts to a lathing contractor the job of installing the lathing materials,[4] and he furnishes these materials to the lathing contractor (*ibid.*). The lathing contractors function as independent entrepreneurs and employ journeymen and apprentice lathers to do the actual work of installation (par. 6, R. 3). There are about

---

peal in No. 440, this Term, and two criminal proceedings which respectively parallel the two civil cases now pending on appeal before this Court. The judgments of dismissal in the criminal cases have been appealed to the Court of Appeals for the Seventh Circuit, but, by stipulation of the parties, these appeals are being held in abeyance pending determination of the two appeals to this Court.

[4] Lathing materials include gypsum lath, metal lath, corner-ites, corner beads, channel irons, and tie-wire (par. 11, R. 4).

BLURRED COPY

36 such contractors operating in the Chicago area (par. 9, R. 3). Sixteen are members of the Association (par. 3(a), R. 2); the dollar volume of the lathing contracts entered into in 1951 by these sixteen exceeded $5,000,000, constituting over 60% of the total lathing contracting business done in the Chicago area in that year (par. 10, R. 4).

The major part of the materials which the lathing contractors install is produced in states other than Illinois and is "shipped in interstate commerce" into the Chicago area "for sale and installation therein" (par. 11, R. 4). These goods are customarily shipped to local building material dealers, who purchase "for resale to plastering contractors" (par. 12, R. 4). Substantial quantities of these purchases are "in response and pursuant to prior orders" placed by plastering contractors (*ibid.*). Dealers also purchase substantial quantities from out-of-state sources in order to meet the "regular anticipated demands" of plastering contractors, and such materials "move in a continuous flow in interstate commerce * * * to the lathing contractors for installation" (par. 13, R. 4). In addition, plastering contractors purchase "through" local dealers substantial quantities of lathing materials which are shipped from outside the state "directly to the job site" or to the plastering contractor's place of business for delivery to the lathing contractor doing the work of installation (par. 14, R. 4). These materials "flow in a continuous, uninterrupted stream" from their out-of-state origins "to the job site for installation" (*ibid.*).

BLEED THROUGH-- POOR COPY

Lathing contractors are "conduits" through which lathing materials shipped from other states "are applied to their intended use in the construction of buildings in the Chicago are," and the materials "flow in a continuous stream * * * to their final installation and use in buildings in the Chicago area" (par. 15, R. 4-5). The service of installation performed by lathing contractors "is an integral part of, and necessary to," this interstate movement. The lathing operation is also an integral part of the building construction industry and necessary to the completion of numerous further building operations, including installation of a wide variety of items. A substantial part of these items, used in buildings in the Chicago area,[5] is manufactured outside of Illinois and shipped in interstate commerce for use in such buildings, and these also "flow in a continuous uninterrupted stream from their points of origin * * * to the places of installation." (Pars. 16-17, R. 5.)

Any restraint upon or interference with the performance of lathing work in the Chicago area "necessarily and directly restrains and affects the interstate flow of lathing materials," and constitutes "a direct and substantial burden and restraint upon the interstate flow" of the materials entering into the construction of buildings in that area (par. 18, R. 5).

The conspiracy in which appellees and their co-

---

[5] In 1951 the building construction industry in the Chicago area engaged in new building or remodeling having a value of approximately $500,000,000 (par. 16, R. 5).

BLURRED COPY

conspirators[6] have been and are engaged is first alleged in the complaint in broad outline. It is charged that for many years they have combined and conspired to suppress competition among lathing contractors in the Chicago area and to restrict and exclude persons from engaging in this business, in "unreasonable restraint" of the interstate commerce in lathing materials described earlier in the complaint (par. 19, R. 6).

The substantial terms of this conspiracy, as further particularized, are that appellees and their co-conspirators agreed:

(a) to restrict and reduce the number of those who may engage in the lathing contracting business, by excluding therefrom any person who had not first secured the approval of Local No. 74 and any person who had not been a member of the Local for five years, and by restricting and reducing the membership of Local 74 by applying arbitrary racial and family-relationship standards for admission to membership;

(b) to assign particular plastering contractors to designated lathing contractors, thereby eliminating competition among lathing contractors for the business of plastering contractors and preventing the latter from choosing the lathing contractors with whom they wish to do business;

(c) to eliminate competition between lathing contractors and plastering contractors by freezing

---

[6] "Numerous lathing contractors" in the Chicago area, including members of the Association, are named in the complaint as co-conspirators (par. 5, R. 2).

BLEED THROUGH– POOR COPY

and reducing the number of plastering contractors permitted to employ members of Local No. 74;

(d) to effectuate money payments by the Association to officers of Local No. 74 to induce them to use the power of the Local in furtherance of appellees' conspiracy (par. 20, R. 6-7).

These four aspects of the conspiracy are alleged in greater detail as follows (pars. 21-28, R. 7-9):

(a) Local 74 required those who wished to engage in the lathing contracting business in the Chicago area to apply to the Local for approval. Approval was granted only to those who had been journeymen members of the Local for five years. Those who failed to receive the Local's approval were not permitted to employ its members, and thereby were excluded from the lathing contracting business in the Chicago area. (Par. 22, R. 7.)

With past membership in Local 74 a prerequisite to engaging in this business, the Local has imposed arbitrary limitations on those who may become members. It has admitted to membership as apprentices only relatives of its journeymen members. It has refused to permit any Negro to become an apprentice or to be admitted to membership as a journeyman lather. It has refused to accept as members by way of transfer of membership, journeymen lathers of the Negro race who were members of out-of-state lathers' unions affiliated with the same International Lathers Union with which Local 74 is affiliated. (Par. 25, R. 8.)

(b) For many years each lathing contractor has registered with Local 74 the plastering contractor

BLURRED COPY

or contractors for whom he performed lathing subcontracts. The lathing contractors understood that, upon registration, a plastering contractor was "assigned" to the lathing contractor who had registered his name. Thereafter, no other lathing contractor would solicit the business of or perform lathing work for such "assigned" plastering contractor. The effect of this "assignment" plan was that no plastering contractor could obtain competitive bids from, or enter into subcontracts with, two or more lathing contractors. A plastering contractor who sought to change his lathing subcontractor had to secure the approval of Local 74, which frequently was denied. (Pars. 26-27, R. 8.)

Plastering contractors became dissatisfied with the "assignment" plan, which suppressed competition among lathing contractors and prevented plastering contractors from dealing with the lathing contractors of their choice. The plan became a disputed issue between the plastering contractors and Local 74, and as a result an agreement was entered into late in 1950 under which Local 74 recognized the right of plastering contractors to obtain bids from and make contracts with more than one lathing contractor. However, shortly thereafter appellees mutually agreed to continue the "registration" and "assignment" plan under the sponsorship of the Association. Each member agreed to register with the Association the plastering contractors whose accounts it "claimed," and agreed not to solicit or perform lathing contracts for a plastering contractor who had been registered by

BLEED THROUGH– POOR COPY

another lathing contractor as his "recognized" account unless the latter consented to such competition. (Pars. 27-28, R. 8-9.)

(c) Prior to the conspiracy, a number of plastering contractors in the Chicago area hired members of Local 74 to do lathing work. With the conspiracy's inception, no additional plastering contractor was permitted to hire journeymen lathers. The result has been that at the present time only seven out of approximately 140 union plastering contractors in the Chicago area may directly employ journeymen lathers. All other plastering contractors must subcontract their lathing work to lathing contractors. (Par. 23, R. 7.)

(d) To induce Local 74 to effectuate the conspiracy to restrict competition in the lathing contracting business, the Association has from time to time paid sums of money to officers of Local 74. The Association made 75% of its dues available for this purpose, and designated its promotion manager to pay sums of money and other consideration to officers and business agents of the Local. The Association also employs the president of Local 74 at a substantial salary to act as managing director of a foundation established and financed by Chicago-area lathing contractors for the purported purpose of promoting the lathing industry. (Par. 24, R. 7-8.)

The conspiracy is alleged to have had the following effects, among others: entry into the lathing contracting business in the Chicago area has been impaired and thwarted, and competition among

BLURRED COPY

those engaged in this business has been unlawfully restrained; interstate commerce in lathing materials has been illegally restrained; and the cost of building construction in the Chicago area has been artificially increased (par. 29, R. 9).

SPECIFICATION OF ERRORS TO BE URGED

The district court erred—

1. In holding that the allegations of the complaint do not show a restraint of interstate commerce.

2. In holding that, under the allegations of the complaint, the conspiracy which it sets forth operated only upon commerce which is intrastate.

3. In adjudging that the complaint fails to state a claim upon which relief can be granted.

4. In entering judgment dismissing the complaint.

SUMMARY OF ARGUMENT

The district court overlooked the fact, recognized in controlling decisions of this Court, that interstate commerce may be obstructed or restrained by conduct affecting the terminal outlets for goods moving interstate. Only recently this Court made it clear that interstate commerce may be affected, in fact and in law, by obstructions to local building activities which in turn obstruct the flow of goods moving interstate to be used in such activities. *National Labor Relations Board* v. *Denver Bldg. Council*, 341 U.S. 675. The rationale of that decision is squarely applicable here.

A. The complaint unequivocally alleges that

BLEED THROUGH– POOR COPY

lathing materials, apart from their installation in buildings, have no utility for ultimate purchasers; that these materials are shipped into the Chicago area from points outside the state for installation in buildings therein; that the lathing contractors are the intended end of the interstate shipments; and that the materials move to such contractors without a break in the interstate journey. The materials remain "in" commerce until they reach the lathing contractors for whom they are intended.

B. The conclusion that the alleged conspiracy is within the Sherman Act would stand even if the interstate flow of lathing materials were deemed to end at some point short of the lathing contractors for whom the materials are intended. What matters is that the complaint plainly alleges that appellees' conspiracy directly and substantially burdens and restrains interstate commerce in lathing and other building materials. Where restraints of a kind condemned by the Sherman Act have such effects, the fact that the restraints are applied intrastate is no barrier to the Act's application. *United States* v. *Women's Sportswear Assn.*, 336 U. S. 460, 464.

Nor does it matter that the precise details of the effects upon interstate commerce are not stated at length in the complaint. Allegations no less general than those involved here were held sufficient in *Mandeville Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219. Further particularization of the allegations is a matter for proof at trial, or for

BLURRED COPY

a motion for a more definite statement, as authorized by the Federal Rules of Civil Procedure.

C. Under the allegations of the complaint, appellees' conspiracy arbitrarily bars qualified persons from engaging in the business which provides the outlets necessary to bring interstate shipments of lathing materials to their intended end, delimits the number who may engage in such business, and eliminates competition among them. Such a combination curtails freedom to engage in interstate trade and subjects interstate commerce to the evils incident to destruction of competition, in contravention of the fundamental purposes of the Sherman Act. This Court has repeatedly held that combinations imposing like limitations on local outlets for interstate sales or shipments of goods violate the Sherman Act. It is well settled that the statute protects interstate commerce against unreasonable restraint at whatever point of such commerce the restraint applies. As this Court recently declared, protection of the earlier stages is of little worth without protection "at the outlets of the flow of interstate commerce." *Lorain Journal Co.* v. *United States*, 342 U. S. 143, 152.

ARGUMENT

The Conspiracy Set Forth in the Complaint Is in Unreasonable Restraint of Interstate Commerce in Lathing Materials Shipped into the Chicago Area

In our view, the fundamental error in the district court's holding, for which no authority is cited, is the apparent assumption that obstructions to and

BLEED THROUGH– POOR COPY

restraints upon interstate commerce can occur only at the beginning, or in the course of, an interstate movement of goods. Thus, the court said (R. 24):

> If this were a situation where portable houses were being built, and there was an additional allegation that after the houses were built, instead of being attached to the real estate and becoming part and parcel of the local Illinois community, where all the acts are alleged to have been committed; and instead of being affixed to real estate remaining in Illinois they were loaded on box cars and sent to other states then there would be such interference with interstate commerce as would support these indictments and complaints herein.

But this analysis ignores the plain economic fact, recognized and emphasized in the decisions of this Court, that commerce among the states may be, and frequently is, burdened by practices at the terminal outlets for goods which move interstate. See, *e.g.*, *Local 167* v. *United States*, 291 U.S. 293, 297. Apart from the controlling precedents under the Sherman Act, which are discussed later, this central point is aptly illustrated in the building trades context involved here by recent decisions under the National Labor Relations Act. In *National Labor Relations Board* v. *Denver Bldg. Council*, 341 U.S. 675, this Court considered whether unfair labor practices at a building project affected interstate commerce and were therefore within the jurisdiction of the Labor Board. The subcontractor immediately involved made out-of-state purchases totalling less than

BLURRED COPY

$56,000 annually. The subcontract for electrical work which occasioned the strike—the unfair labor practice found by the Labor Board—involved only $2,300. Sustaining the Board's finding that commerce was affected (341 U.S. at 683-684), the Court, in an observation which contrasts strikingly with the statement we have quoted from the opinion below, said (p. 684):

> The fact that the instant building, after its completion, might be used for only local purposes does not alter the fact that its construction, as distinguished from its later use, affected interstate commerce.

See, also, *Electrical Workers* v. *National Labor Relations Board*, 341 U. S. 694; *Carpenters Union* v. *National Labor Relations Board*, 341 U. S. 707.

This reasoning is precisely applicable here. Here, as in the Labor Board cases (but on a much larger scale),[7] there is an interstate flow of goods which serve the single purpose of use in construction. And the uncontroverted allegations of the complaint state plainly that restraints upon those engaged in supplying and installing essential building materials have operated to restrain the commerce in these materials. The sufficiency of these allegations becomes clear, we think, once it is recognized—as this Court has recognized—that such construction, despite the intended local use of the

[7] The 1951 business of lathing contractors in the Chicago area exceeded $8,000,000; the 1951 business of the contractors who were members of the Association exceeded $5,000,000; and the major part of the materials which these contractors install is produced in states other than Illinois (pars. 9-11, R. 3-4).

BLEED THROUGH– POOR COPY

building constructed, can have a real and substantial effect upon commerce.

In the discussion which follows we show, first, that the interstate movement of lathing materials described in the complaint continues until the materials reach the lathing contractors for whom they are destined; second, that even if the materials in question were deemed to cease moving "in" commerce at some point short of delivery to the lathing contractors, the appellees' conduct would fall well within the scope of the Sherman Act's regulation as defined by decisions of this Court; and, third, that the acts with which appellees are charged are restraints on interstate commerce of a kind proscribed by the Sherman Act.

A. *The Lathing Materials Shipped from States other than Illinois Remain in Interstate Commerce until they reach the Lathing Contractors for whom they are Destined*

The complaint explicitly sets forth that a major part of the lathing materials installed in buildings in the Chicago area is produced outside the State of Illinois and is shipped into the area "for" installation in buildings constructed therein (par. 11, R. 4). These materials, until installed in buildings, are of no use to the ultimate purchaser, and the service of installation, which lathing contractors perform, is an "integral" and "necessary" part of the "movement in interstate commerce" of lathing materials shipped from outside the state to be "applied to their intended use in the construction of buildings in the Chicago area" (par. 15, R. 4-5). The mate-

BLURRED COPY

rials "flow in a continuous stream" from their out-of-state origins "to their final installation and use" in Chicago-area buildings (par. 15, R. 5). These are allegations of fact, stating definitely and unambiguously that lathing materials coming from beyond the state's borders move to the lathing contractors without a break in the interstate movement.[8]

Further allegations of the complaint pinpoint this fact. Thus, it is alleged that substantial quantities of materials are shipped from other states "directly to the job site" or to the plastering contractor's place of business "for delivery to the lathing contractor" who has undertaken the work of installation (par. 14, R. 4). Continuity of interstate movement is likewise clear as to the substantial quantities which local dealers purchase in other states "in response and pursuant to prior orders" placed with them by plastering contractors (par. 12, R. 4). Goods so purchased remain in interstate commerce "until they reach the customers for whom they are intended"; "the interstate journey is not ended by reason of a temporary holding of the goods at the warehouse" of the wholesaler who purchased them from outside the state. *Walling* v. *Jackson-*

---

[8] Cf. *United States* v. *Chrysler Corp. Parts Wholesalers*, 180 F. 2d 557, 559 (C.A. 9), where the defendants were wholesalers who purchased certain products from outside the state and resold within the state to the ultimate users. The court, in sustaining the sufficiency of an indictment charging price fixing in defendants' sales, held that the allegation that the products in question moved from other states "in a continuous and uninterrupted flow to the ultimate users" was "a statement of an ultimate fact."

BLEED THROUGH– POOR COPY

ville Paper Co., 317 U. S. 564, 568-569. In that case the Court observed that the fact that the purchasing wholesaler "may treat the goods as stock in trade" or that title to the goods passes to him does not mean that the interstate journey ends at his warehouse; the contract, understanding, or special order pursuant to which he ordered the goods "indicates where it was intended that the interstate journey should terminate" (*id.* at 569).[9]

Still other substantial quantities of materials are purchased by local dealers from sources outside the state to meet "the regular anticipated demands" of plastering contractors (par. 13, R. 4). The complaint alleges that goods so purchased "move in a continuous flow in interstate commerce" from their out-of-state sources "through the dealers and plastering contractors to the lathing contractors for installation" (*ibid.*). The Court in the *Jacksonville Paper* case, *supra*, expressly recognized that there may be circumstances in which purchases "based on anticipation of needs of specific custo-

[9] It would have been clear, we think, long before the *Jacksonville Paper* case that the intermediate purchase by local building material dealers does not destroy the force of the allegations of continuity in interstate movement. The dealers purchase the lathing goods "for resale" to plastering contractors (par. 12, R. 4), and the lathing contractors to whom the plastering contractors deliver are the intended end of the shipments from other states (par. 15, R. 5). A product moving in interstate commerce continues therein "until [it] reaches the point where the parties originally intended that the movement should finally end." *Illinois Central R. R.* v. *Louisiana R. R. Commission*, 236 U.S. 157, 163, and cases cited. This rule, grounded in economic fact, applies generally, and serves to define the commerce which, because it is interstate, is within the Sherman Act. *Binderup* v. *Pathe Exchange, Inc.*, 263 U. S. 291, 309.

BLURRED COPY

mers" may establish that interstate commerce continues until the goods reach the customers whose needs were anticipated. 317 U. S. at p. 570. The "continuous flow" allegation requires the assumption that, under the circumstances in which the purchases now in question were made, the shipments did not lose their interstate character until they reached the customer-users whose needs were anticipated.

Pertinent, finally, is the decision in *Standard Oil Co.* v. *Federal Trade Commission,* 340 U. S. 231, 237-238, which held that Standard Oil's sales to Detroit customers of gasoline taken out of the company's marine terminal at River Rouge, Michigan, were sales "in" interstate commerce. Gasoline was brought to the terminal from other states in the company's Great Lakes tankers during the open season of navigation. During this season, sufficient supplies were accumulated to meet the winter's needs, and shipments to the terminals were not pursuant to orders already taken. It thus appears that even a product which comes to a long and indefinite period of rest within the state of resale does not necessarily lose its interstate character.

B. *Even if the Movement of the Lathing Materials "in" Interstate Commerce Ended before They Reached the Lathing Contractors, the Conspiracy Unreasonably Restrains Interstate Commerce*

We have argued above, and we think the complaint fairly alleges, that the lathing materials

BLEED THROUGH– POOR COPY

move "in" interstate commerce until they reach the lathing contractors for installation. It remains to point out that the appellees would be no better off if this were not so. The complaint alleges that restraint upon or interference with performance of lathing work in the Chicago area "necessarily and directly restrains and affects the interstate flow of lathing materials," and constitutes "a direct and substantial burden and restraint upon the interstate flow of" building materials entering into the construction of buildings in the Chicago area (par. 18, R. 5). The complaint further alleges that the conspiracy has caused interstate commerce in lathing and related building materials to be "unlawfully restrained," and that it has caused an artificial increase in the cost of building construction in the Chicago area (pars. 29(c), (e), R. 9). The important fact appearing from these allegations, regardless of any supposed point where interstate commerce ends and intrastate commerce begins, is that the materials move into the state solely and precisely for use by the lathing contractors. Because this is so, the restraints on such use—and the concomitant restraints on the flow of the materials into the state—fall within the prohibitions of the Sherman Act.

There is, of course, no doubt that the Sherman Act is violated when restraints of a kind condemned by the Act affect and operate upon interstate commerce, although application of the restraints is intrastate. *United States* v. *Women's Sportswear Assn.*, 336 U. S. 460, 464. In such a situation, it is

BLURRED COPY

not necessary to decide the precise point at which "interstate commerce ends and that which is intrastate begins." *Local 167* v. *United States*, 291 U. S. 293, 297. Interference with freedom of trade "at the place of origin before the interstate journey begins or in the State of destination where the interstate movement ends may operate directly to restrain and monopolize interstate commerce" (*ibid*). As this Court put the matter in another Sherman Act case, it is not necessary "to search for some sharp point or line where interstate commerce ends and intrastate commerce begins, in order to decide whether Congress' commands were effective." *Mandeville Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219, 232.

Nor is the charge of effect on interstate commerce defective by reason of failure to set forth a precise blueprint or detailed catalogue of such effect. This is a matter appropriate for development at the trial, and the defendants, in advance of trial, may move under Rule 12(e) of the Federal Rules of Civil Procedure for a more definite statement of this aspect of the complaint. The allegations here are at least as specific as those held to be adequate in *Mandeville Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219.[10]

---

[10] In that case the basis of the Sherman Act proceeding against a sugar refiner was price fixing in the purchase of sugar beets by the three refiners located in the area in which the plaintiff grew sugar beets, the principal raw product used in making refined sugar. The purchases were intrastate, but the following allegations were held to set forth an effect on interstate commerce sufficient to state a cause of action under the Sherman Act: "interstate commerce in sugar was illegally

BLEED THROUGH– POOR COPY

In appraising the allegations of effect, it is relevant to consider that the effect is not that of a single act, or of a series of isolated acts, but of day-to-day and continuing control over outlets requisite if the interstate flow into the Chicago area of lathing and other building materials is not to be dammed. Furthermore, the conspiracy embodies a pattern of restraint "which if left unchecked may well become far-reaching in its harm to commerce." Cf., *Polish National Alliance* v. *National Labor Relations Board,* 322 U. S. 643, 647-648; *Mandeville Farms* case, *supra,* at p. 236. That the restraints involved here are of a pattern with restraints which have repeatedly plagued the building construction industry is not a matter of speculation. Such restraints have been the subject of many proceedings under the Sherman Act. Typical cases involving building materials or equipment are [11]

Electrical equipment: *United States* v. *Northeast Texas Chapter, National Electrical Contractors Assn.,* 181 F. 2d 30 (C. A. 5); *United States* v. *Minneapolis Electrical Contractors Assn.,* 99 F. Supp. 75 (D. Minn);

---

restrained" and "competition therein" was "destroyed"; as a direct and planned result of the conspiracy, "the free and natural flow of commerce in interstate trade was intentionally hindered and obstructed," so that instead of the refiners producing and selling raw sugar in interstate commerce in competition with each other, "they became illegally associated in a common plan wherein they pooled their receipts and expenses and frustrated the free enterprise system * * *." 334 U.S. 226.

[11] The cases cited do not include the numerous Sherman Act cases involving building materials where a bid depository was used as a means for fixing prices.

BLURRED COPY

United States v. *Chattanooga Chapter, National Electrical Contractors Assn.*, CCH Trade Reg. Reporter, ¶67,551 (E. D. Tenn.).

Plumbing supplies: *United States* v. *Central Supply Assn.*, 6 F. R. D. 526 (N. D. Ohio); *United States* v. *Las Vegas Merchant Plumbers Assn.* (D. Nev.), *Federal Antitrust Laws*, CCH 1952, p. 409 (appeal from convictions pending, C. A. 9).

Plaster and plastering materials: *United States* v. *Employing Plasterers Assn.*, appeal pending No. 440, this Term; *United States* v. *Contracting Plasterers' Assn. of Long Beach* (S. D. Calif.), *Federal Antitrust Laws*, CCH 1952, p. 206.

Glass: *United States* v. *Glass Contractors' Assn.* (N. D. Ill.), *Federal Antitrust Laws*, CCH 1952, p. 219.

Marble: *United States* v. *Associated Marble Companies* (N. D. Calif.), *Federal Antitrust Laws*, CCH 1952, p. 224.

Tiles: *United States* v. *Tile Contractors' Assn. of America* (N. D. Ill.), *Federal Antitrust Laws*, CCH 1952, p. 222.

Lumber: *United States* v. *Harbor District Lumber Dealers Assn.* (S. D. Calif.), *Federal Antitrust Laws*, CCH 1952, pp. 213, 246. Cf. *United Brotherhood of Carpenters* v. *United States*, 330 U. S. 395.

Built-up roofs: *United States* v. *Detroit Sheet Metal & Roofing Constructors Assn.*, 116 F. Supp. 81 (E. D. Mich.).

We submit, in short, that both economic fact and controlling precedent must be ignored to conclude that, because they are "local", restraints in the

BLEED THROUGH– POOR COPY

building trades *cannot* affect the interstate flow of materials which move for the single purpose of use in these trades. And only such a fallacious conclusion could explain the decision below. For the complaint states clearly and unambiguously that appellees' restraints operate upon the interstate flow of lathing materials into the Chicago area. Such allegations define conduct squarely within the area regulated by the Sherman Act.

C. *Appellees' Restrictions on Outlets for Interstate Shipments of Lathing Materials are Restraints on Interstate Trade, of a Kind Banned by the Sherman Act*

Appellees' conspiracy reduced and restricted the outlets for lathing materials shipped into the Chicago area in interstate commerce. The conspiracy limited these outlets to (a) the plastering contractors who were engaged in installing lathing materials prior to the beginning of the conspiracy and (b) those persons who could obtain the approval of Local 74 to operate as lathing contractors, an approval denied to any person not previously a journeyman member of the local for five years (pars. 22-23, R. 7). Appellees, by these limitations, barred 95% of all plastering contractors doing business in the Chicago area (par. 23), and they reduced the number of lathing contractors in the area, compared with 1925, by more than 60% (par. 29(a), R. 9).[12]

---

[12] From a long-range standpoint, Local 74's membership restrictions limited the number of lathing contractors. Only a past member of the Local could become a lathing contractor.

BLURRED COPY

The conspiracy, in addition to reducing and restricting those who might engage in the business of providing necessary outlets for interstate shipments of lathing materials, eliminated all competition among those who were permitted to engage in this business. An "assignment" plan was established under which each plastering contractor could deal with only the one lathing contractor who had registered his name with Local 74. Furthermore, no plastering contractor could shift from the lathing contractor to whom he was assigned without procuring the approval of Local 74. Later, when Local 74 agreed to permit plastering contractors to obtain bids from and make contracts with more than one lathing contractor, the Association members agreed to continue the assignment plan under the sponsorship of the Association. (Pars. 26-28, R. 8-9.)

To assure the cooperation of officers and business agents of Local 74, a venal relationship between them and the Association was established, by providing substantial Association funds for payment to these officers and agents (par. 24, R. 7-8).

In short, appellees maintained and enforced a tight oligarchy of a business providing the sole outlet for entry into the Chicago-area market of lathing materials shipped from other states. Competition among members of this oligarchy was also eliminated. Beyond any question, these restraints are far more drastic than what was condemned as illegal in *United States* v. *Women's Sportswear*

The Local permitted only relatives of existing members to become apprentice members, and excluded all Negroes as journeymen members (par. 25, R. 8).

BLEED THROUGH– POOR COPY

Assn., 336 U.S. 460. There the defendants merely required jobbers of women's sportswear to have stitching work (necessary to complete garments ordered by the jobbers' customers) done by members of the stitching contractors' association who were in good standing with the International Ladies' Garment Workers' Union.

We submit that the restraints charged in the instant case are just as clearly within the prohibitions of the Sherman Act as the restraints imposed by a conspiracy to require a commodity brought into a city from other states to be delivered only to certain terminals, to limit the number of such terminals, and to require each importer of the commodities to deal with only one designated terminal. Cf. *Local 167* v. *United States,* 291 U.S. 293.

The principles which control where, as here, the conspiracy narrows and controls the trade outlets for incoming materials, and compels those who require such outlets to deal on a non-competitive basis with a single outlet, are clearly stated in *Lorain Journal Co.* v. *United States,* 342 U.S. 143. The Court there said (p. 152):

> Unless protected by law, the consuming public is at the mercy of restraints and monopolizations of interstate commerce at whatever points they occur. Without the protection of competition at the outlets of the flow of interstate commerce, the protection of its earlier stages is of little worth.

This Court has from an early date, and with great consistency, condemned as illegal under the Sherman Act combinations, enforced by boycotts

BLURRED COPY

or other means, to cut off or otherwise restrain local trade outlets for goods sold or shipped interstate. Among such decisions are *Montague & Co.* v. *Lowry*, 193 U.S. 38 (tiles); *Standard Sanitary Mfg. Co.* v. *United States*, 226 U.S. 20, 48-49 (enameled iron wear); *Eastern States Retail Lumber Dealers' Assn.* v. *United States* 234 U.S. 600, 611 (lumber); *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U.S. 457, 465 (women's clothes); *United States* v. *Crescent Amusement Co.*, 323 U.S. 173 (motion pictures); *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 226 (taxicabs); *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (news and advertising). See also *Associated Press, Inc.* v. *United States*, 326 U.S. 1, 18-19.

In the instant case the district court appears to have believed that the absence of an allegation that the conspiracy affected the "interstate market price" of lathing materials invalidated the complaint (R. 16). But the Sherman Act prohibits not only conspiracies to fix or manipulate market prices but also conspiracies to engage in restrictive practices, including apportionment of customers, which "otherwise take from buyers or consumers the advantages which accrue to them from free competition in the market." *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 497-498.

The court below apparently also attached significance to the absence of an allegation that the defendants "intended to burden interstate commerce" (R. 17). However, it is well settled, at least since the early case of *United States* v. *Patten*, 226

BLEED THROUGH– POOR COPY

U.S. 525, 543, that "no allegation of a specific intent to restrain" interstate commerce is necessary.[13] This Court ruled that those charged with conspiracy "must be held to have intended the necessary and direct consequences of their acts" and that when they engage in a conspiracy which necessarily produces a result which the statute is designed to prevent, "they are, in legal contemplation, chargeable with intending that result" (*ibid.*).

In the court below appellees relied in major measure upon *Industrial Association of San Francisco* v. *United States,* 268 U. S. 64, and *Levering & Garrigues Co.* v. *Morrin,* 289 U. S. 103. In the former case building contractors in San Francisco and dealers in building materials supplying such contractors formed an organization composed of such contractors and dealers for the purpose of maintaining the "open shop" policy in employment of labor used in constructing buildings in San Francisco. In order to enforce this policy, the defendants adopted a "permit system," applicable to certain specified materials which were produced in California. Only contractors who maintained an open shop were given a permit, and the dealers furnished permit materials only to contractors holding permits. This Court held that, on these facts, there was no restraint of interstate commerce banned by the Sherman Act. The principal contrary contention was that, since non-permit contractors

[13] In the *Patten* case the issue was whether the allegations of the indictment stated an offense under the Sherman Act.

BLURRED COPY

were unable to obtain materials necessary for carrying out construction jobs, they were eliminated as potential purchasers of building supplies, not covered by the permit system, manufactured in other states. This Court held, however, that this effect upon interstate trade "was a fortuitous consequence so remote and indirect as plainly to cause it to fall outside the reach of the Sherman Act." 268 U. S. at p. 82.

The *Morrin* case involved the reverse situation—suit to enjoin certain labor unions from combining to force those engaged in erecting structural steel in buildings constructed in New York City, to operate upon a closed union shop basis. The issue reviewed by this Court was whether the complaint stated a cause of action under the Sherman Act. The Court said that, under the allegations, "the sole aim of the conspiracy was to halt or suppress local building operations as a means of compelling the employment of union labor." 289 U. S. at 107. It held: "If thereby the shipment of steel in interstate commerce was curtailed, that result was incidental, indirect and remote, and, therefore, not within the anti-trust acts * * *." *Ibid.*

In *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293, which gave effect to the established rule that acts done within a state may illegally restrain interstate commerce, the Court referred to the *Industrial Association* and *Morrin* decisions as follows (p. 297):[14]

---

[14] The explanation quoted is repeated in *Mandeville Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219, 234, n. 14.

BLEED THROUGH– POOR COPY

> It is true that this Court has on occasion determined that local conduct could be insulated from the operation of the Anti-Trust laws on the basis of the purely local aims of a combination, insofar as those aims were not motivated by the purpose of restraining commerce, and where the means used to achieve the purpose did not directly touch upon interstate commerce.

In the present case, in contrast with the cases on which appellees rely, the restraints did "directly touch upon interstate commerce." They closed outlets which are "an integral part of * * * the movement in interstate commerce" (par. 15, R. 5). They also eliminated competition in procuring the services of those necessary to complete the interstate movement, in contravention of the fundamental purpose of the Sherman Act "to protect the public against evils commonly incident to destruction of competition" (*Ramsay Co.* v. *Bill Posters Assn.*, 260 U. S. 501, 512). Given these factual differences, it seems unnecessary to press at length the further point that the Court in the cases which appellees invoke approached the interstate commerce question from the standpoint of "direct" or "indirect" effect thereon, an approach now deemed not illuminating. See *Wickard* v. *Filburn*, 317 U. S. 111, 122-125; *Mandeville Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219, 229-231.

BLURRED COPY

CONCLUSION

For the foregoing reasons, the judgment of the district court dismissing the complaint should be reversed.

Respectfully submitted.

ROBERT L. STERN,
Acting Solicitor General.
STANLEY N. BARNES,
Assistant Attorney General.
CHARLES H. WESTON,
MARVIN E. FRANKEL,
Special Assistants to the Attorney General.

JANUARY, 1954.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1954 295439 777

BLEED THROUGH— POOR COPY

LE COPY

FILED
JAN 13 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1953

No. 439

UNITED STATES OF AMERICA,
Appellant,

VS.

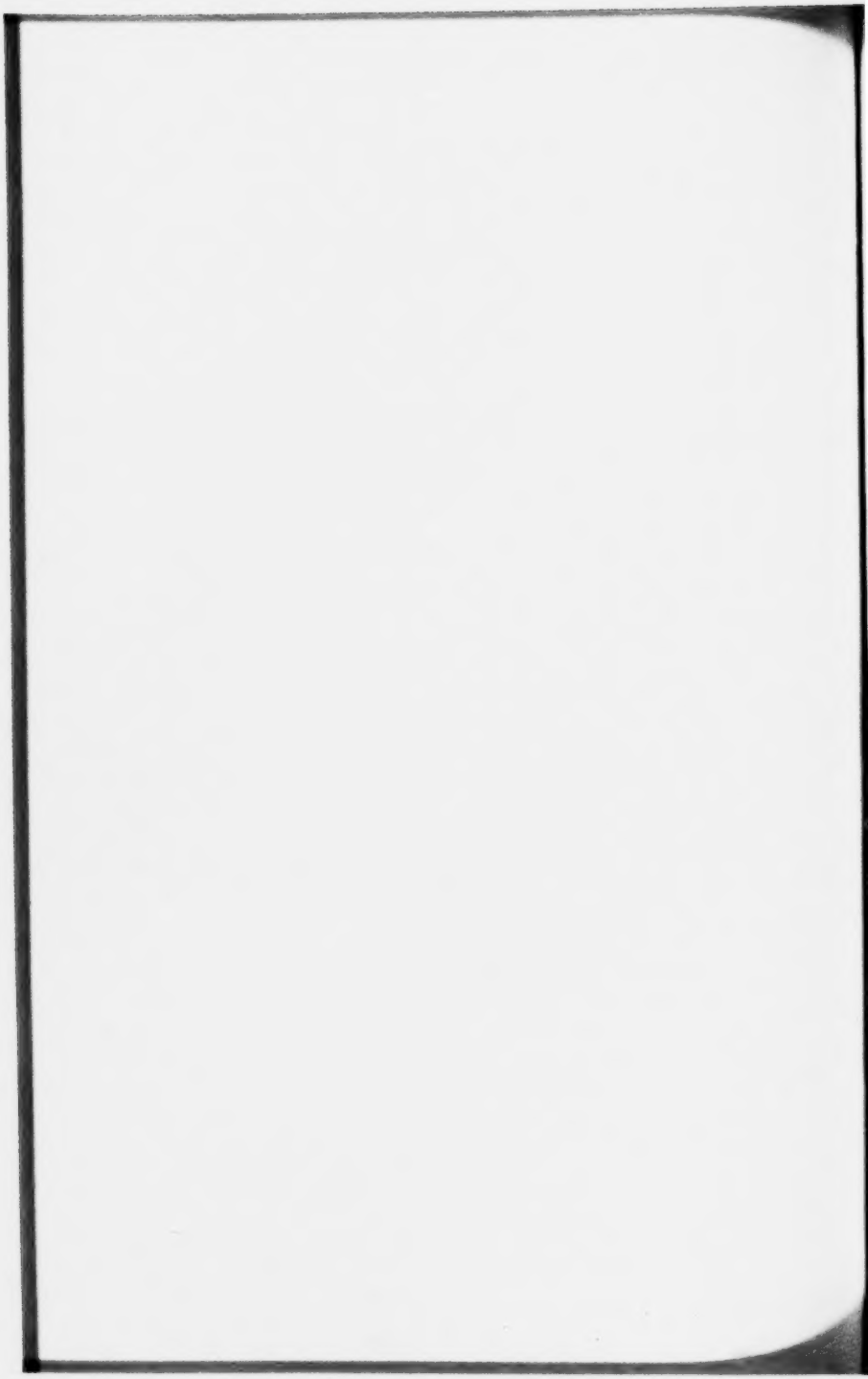
EMPLOYING LATHERS ASSOCIATION OF CHICAGO AND VICINITY; LOCAL NO. 74 OF WOOD, WIRE AND METAL LATHERS INTERNATIONAL UNION OF CHICAGO, ETC., ET AL.
Appellees,

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

MOTION OF APPELLEE TO DISMISS OR AFFIRM

NATHAN M. COHEN,
ROBERT S. FIFFER,
Attorneys for Local No. 74 of Wood, Wire and Metal Lathers International Union of Chicago, Illinois and Vicinity.
Appellee.

CHAMPLIN-SHEALY COMPANY, CHICAGO 965



BLEED THROUGH- POOR COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1953

No. 439

UNITED STATES OF AMERICA,
Appellant,

VS.

EMPLOYING LATHERS ASSOCIATION OF CHICAGO AND VICINITY; LOCAL NO. 74 OF WOOD, WIRE AND METAL LATHERS INTERNATIONAL UNION OF CHICAGO, ETC., ET AL.
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

MOTION OF APPELLEE TO DISMISS OR AFFIRM

Defendant-Appellee, Local No. 74 of Wood, Wire and Metal Lathers International Union of Chicago, Illinois and Vicinity, hereinafter referred to as Local 74, moves, pursuant to Rule 7 of the Rules of the Supreme Court, to dismiss the appeal herein or to affirm the judgment of the district court, on the ground that the appeal does not present a substantial question for determination by the Court.

BLURRED COPY

I.

Statement

The Government commenced this suit on July 31, 1952 by filing a complaint in equity against the Defendants-Appellees.[1] The complaint sought an adjudication that the agreements and acts alleged unreasonably restrained interstate commerce, and monopolized interstate commerce, in violation of the Sherman Act, 26 Stat. 209; 50 Stat. 693; 15 U. S. C., §§ 1 and 2. Only prospective relief—an injunction—was sought.

The trial judge found that the complaint contained no allegations showing that defendants intended to, or did in fact, restrain interstate commerce, and therefore, on July 20, 1953, granted defendants' motion to dismiss the complaint.

The Government did not ask the district court for leave to amend its complaint, but elected to appeal directly to this Court. The defendants did not file statements opposing jurisdiction, and none of the matters raised herein has previously been presented to the Court. The Court noted probable jurisdiction on November 30, 1953 and transferred the case to the summary docket. Argument is set for February 4, 1954.

II.

Appellant was not prejudiced by the dismissal of its complaint.

Dismissal on July 20, 1953 of the complaint filed on July 31, 1952, did not prevent the Government from filing a new complaint remedying the deficiencies of the first. As stated

[1] Defendants-Appellees are Employing Lathers Association of Chicago and Vicinity; Local No. 74 of Wood, Wire and Metal Lathers International Union of Chicago, Illinois and Vicinity; Harry D. Follett; and Edward D. Chouinard.

BLEED THROUGH– POOR COPY

in *United States* v. *Oregon State Medical Society*, 343 U.S. 326, an equity suit under the Sherman Act (p. 333):

> "It will simplify consideration of such cases as this to keep in sight the target at which relief is aimed. The sole function of an action for injunction is to forestall future violations. * * * All it takes to make the cause of action for relief by injunction is a real threat of future violation or a contemporary violation of a nature likely to continue or recur."

Whenever there is a real threat of future violation of the Sherman Act, the Government can meet the threat with a new complaint. Its right and duty to do so [Section 4 of the Sherman Act, 26 Stat. 209; 15 U. S. C. § 4] are neither impaired nor suspended by the dismissal of the first complaint filed.

III.

This appeal presents only a narrow question of the sufficiency of a pleading.

The sole effect of the decision below would be as a precedent in future cases wherein like issues were presented. The only issue determined by the trial court was that the particular complaint before it did not allege that the defendants restrained, monopolized, or intended to restrain or to monopolize *interstate* commerce.

This proposition is so narrow in its scope as to have practically no impact as a precedent. Such decisions are legion, and each turns upon its own special facts.

IV.

As applied to this case, the question posed by government counsel is too insubstantial to need further argument.

In this case the allegations were insufficient to show that the flow of building materials into the Chicago area, the

BLURRED COPY

only interstate commerce alleged to be involved, was in any way affected by the activities of the defendants. [2]

The materials involved were bought and sold by building material dealers and local plastering contractors, but *not* by the defendants. The only connection between the defendants and the materials was (1) a union lather would hold some of the materials (laths) in one hand and drive others (nails) in with a hammer held in the other hand and, (2) an employing lather would supervise the union lather. The performance of lathing work was not alleged to have been interfered with in any way. The price of lathing materials was not alleged to have been affected in any way. The movement of materials into Illinois from other states was not alleged to have been restricted.

---

[2] What the complaint omits is as eloquent as what it alleges.

What it includes may be summarized as follows:

1. Defendants are Illinoisans, and all of their activities occur in the Chicago area.
2. The union represents the men called lathers, whose skilled labor is needed to put laths onto the walls of buildings, before plaster is added.
3. The employing lathers hire and supervise the work of the union lathers.
4. Neither the union nor the employers buy or sell lathing material. They deal only in labor and the service of hiring and supervising labor.
5. The laths and nails to which defendants apply their skills are bought and sold by building material dealers and plastering contractors, but not by the defendants. These materials come from outside of Illinois, and remain for varying lengths of time in Illinois before being built into buildings.
6. The employing lathers deal with plastering contractors. The alleged agreement has the purpose and effect of requiring certain plastering contractors to contract only with the employing lathers who are assigned to work with them.
7. Most plastering contractors are prevented by the alleged agreement from themselves hiring and supervising union lathers. They must contract with employing lathers who perform this function.
8. To qualify as an employing lather, one must first learn and practice the lathing trade for five years as a journeyman member of the union.

(Footnote No. 2 continued on p. 5.)

BLEED THROUGH– POOR COPY

The decision below was founded on the most obvious proposition in the whole field of anti-trust law, for nothing is more fundamental than that Sections 1 and 2 of the Sherman Act, foreign trade aside, are concerned only with contracts, combinations and conspiracies which are intended to or do in fact restrain or monopolize interstate commerce.[3]

As the Court recently stated, "* * * if there was no restraint of interstate commerce, the conduct charged does not fall within the prohibitions of the Sherman Act." *United States* v. *Oregon State Medical Society*, 343 U.S.

[3] "Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy *in restraint of trade or commerce among the several States*, or with foreign nations, is declared to be illegal: * * *"

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, *to monopolize any part of the trade or commerce among the several States*, or with foreign nations, shall be deemed guilty of a misdemeanor. * * *"

(Footnote No. 2 concluded from p. 4.)

What the complaint omits may be summarized as follows:

1. Any charge that the defendants' activities have any effect on the cost, volume or quality of building construction, or the cost, volume or quality of lathing materials in the Chicago area.
2. Any charge that the activities alleged reduce the demand for lathing materials, or restrict the supply, impede the transportation, or tend in any way to depress or increase the price of lathing materials.
3. Any charge that the defendants have intended that their arrangement burden the interstate flow, or diminish the local consumption of lathing materials.
4. Any charge that the defendants who work with the materials, have conspired with the building material dealers or with the plastering contractors, who buy and sell the materials, with the purpose or effect of fixing prices, reducing quality, restricting volume, or otherwise burdening or interfering with (1) the performance of lathing work in Chicago and vicinity, (2) the sale of building materials in Chicago and vicinity, (3) the purchase and shipment into Illinois of building materials from other states, or (4) building construction in the area generally.

All of the above omissions are left to the imagination of the Court. The complaint speculates that interstate commerce in lathing and other building materials has been restrained but omits to state any facts bearing out this speculative conclusion.

BLURRED COPY

326, 338. "The vital thing is the effect on commerce* * *." *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 238.

The words "commerce among the several States" had to be used in the statute "to relate the prohibited restraint of trade to interstate commerce for constitutional purposes." *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 495; *Atlantic Cleaners & Dyers* v. *United States*, 286 U.S. 427, 434; *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 547.

It follows, of course, that a complaint which does not allege that the activities of the defendants were intended to or did in fact restrain *interstate* commerce fails to state a claim for which relief can be granted under the Sherman Act, and should be dismissed. *United States* v. *Yellow Cab Co.*, 332 U. S. 218. In the *Yellow Cab* case, although defendants' vehicles conveyed interstate train passengers between their homes and the railroad station in the normal course of their local service, the Court noted that the local taxicab service was "not an integral part of interstate transportation" and said (p. 233):

> "* * * And a restraint on or monopoly of that general local service, without more, is not proscribed by the Sherman Act.
>
> "It follows that the complaint, insofar as it is based on such local taxicab service, fails to state a cause of action under the Sherman Act."

One of the requirements imposed upon the Government by Rule 8(a) of the Federal Rules of Civil Procedure was that its complaint contain "a short and plain statement of the claim *showing that the pleader is entitled to relief.*" The motions to dismiss filed by the defendants in the district court, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, raised the issue whether the Govern-

BLEED THROUGH– POOR COPY

ment's complaint showed that the pleader was "entitled to relief" under the Sherman Act. Since a complaint seeking relief under the Sherman Act is defective unless it contains allegations showing that the defendants intended to or did in fact restrain or monopolize interstate commerce, the district court dismissed the Government's complaint.

The action of the district court in dismissing the government's complaint was not predicated upon any new principle of pleading or any new interpretation of the anti-trust laws. On the contrary, the district judge declined the Government's request that he go beyond the well-defined limits set by this Court, and stated in his memorandum opinion:

> "* * * This Court is bound by the language of the Sherman Act and its subsequent judicial interpretation. * * *" (Transcript of Record, page 24.)

On examining the complaint herein, the district court found that it did not plead any facts showing that the alleged conspiracy of the defendants was intended to or did in any way affect interstate commerce. In its memorandum opinion, the district court said:

> "There is no allegation showing that these defendants intended to burden interstate commerce by this alleged conspiracy. There is no allegation of fact that it does so burden interstate commerce." (Transcript of Record, page 24.)

Thus recognizing the obvious insufficiency of the Government's pleading when judged by the standards established by this Court, the district court entered its order of dismissal.

No broad question of law was decided. No new interpretation of the Sherman Act was announced. The district court followed the controlling decisions of this Court.

BLURRED COPY

Levering & Garrigues Co. v. *Morrin,* 289 U. S. 103.

Industrial Association v. *United States,* 268 U. S. 64.

United States v. *Oregon State Medical Society,* 343 U. S. 326.

United States v. *Yellow Cab Co.,* 332 U. S. 218, 228-233.

Apex Hosiery Co. v. *Leader,* 310 U. S. 469.

Kansas City Steel Co. v. *Arkansas,* 269 U. S. 148.

Browning v. *Waycross,* 233 U. S. 16.

Anderson v. *Shipowners Association,* 272 U. S. 359, 363-364.

Hopkins v. *United States,* 171 U. S. 578.

Cf., *United States* v. *Hutcheson,* 312 U. S. 219, particularly concurring opinion of Mr. Justice Stone at pp. 237-243; *United States* v. *Building & Construction Trades Council, et al.,* 313 U. S. 539; *United States* v. *United Brotherhood of Carpenters and Joiners of America, et al.,* 313 U. S. 539; *United States* v. *International Hod Carriers & Common Laborers' District Council, et al.,* 313 U. S. 539, affirming *United States* v. *Carrozzo,* 37 F. Supp. 191 (N. D. Ill., E. D.)

V.

The district court was without jurisdiction and its judgment dismissing the complaint should be affirmed.

This Court has held that a defect in pleading of the nature here involved requires dismissal of a suit for want of jurisdiction. *Levering & Garrigues Co.* v. *Morrin,* 289 U. S. 103.

BLEED THROUGH– POOR COPY

The following portions of the opinion in the *Levering* case are equally applicable to the appeal in this case:

> "The question of jurisdiction as thus limited is to be determined by the allegations of the bill, and not upon the facts as they may turn out, or by a decision of the merits. * * * jurisdiction, as distinguished from merits, is wanting where the claim set forth in the pleading is plainly unsubstantial. * * * And the federal question averred may be plainly unsubstantial either because obviously without merit, or 'because its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.'
>
> * * * * * *
>
> "* * * If thereby the shipment of steel in interstate commerce was curtailed, that result was incidental, indirect and remote, and, therefore, not within the anti-trust acts, as this court, prior to the filing of the present bill, had already held. * * * It follows that the federal district court was without jurisdiction because the federal question presented was plainly unsubstantial * * *."

VI.

Conclusion.

For the reasons set forth herein, Appellee, Local 74, respectfully urges that the appeal in this cause fails to present to the Court any substantial question and should be dismissed for that reason and for want of jurisdiction, or, in the alternative, that the judgment of the district court should be affirmed.

Respectfully submitted,

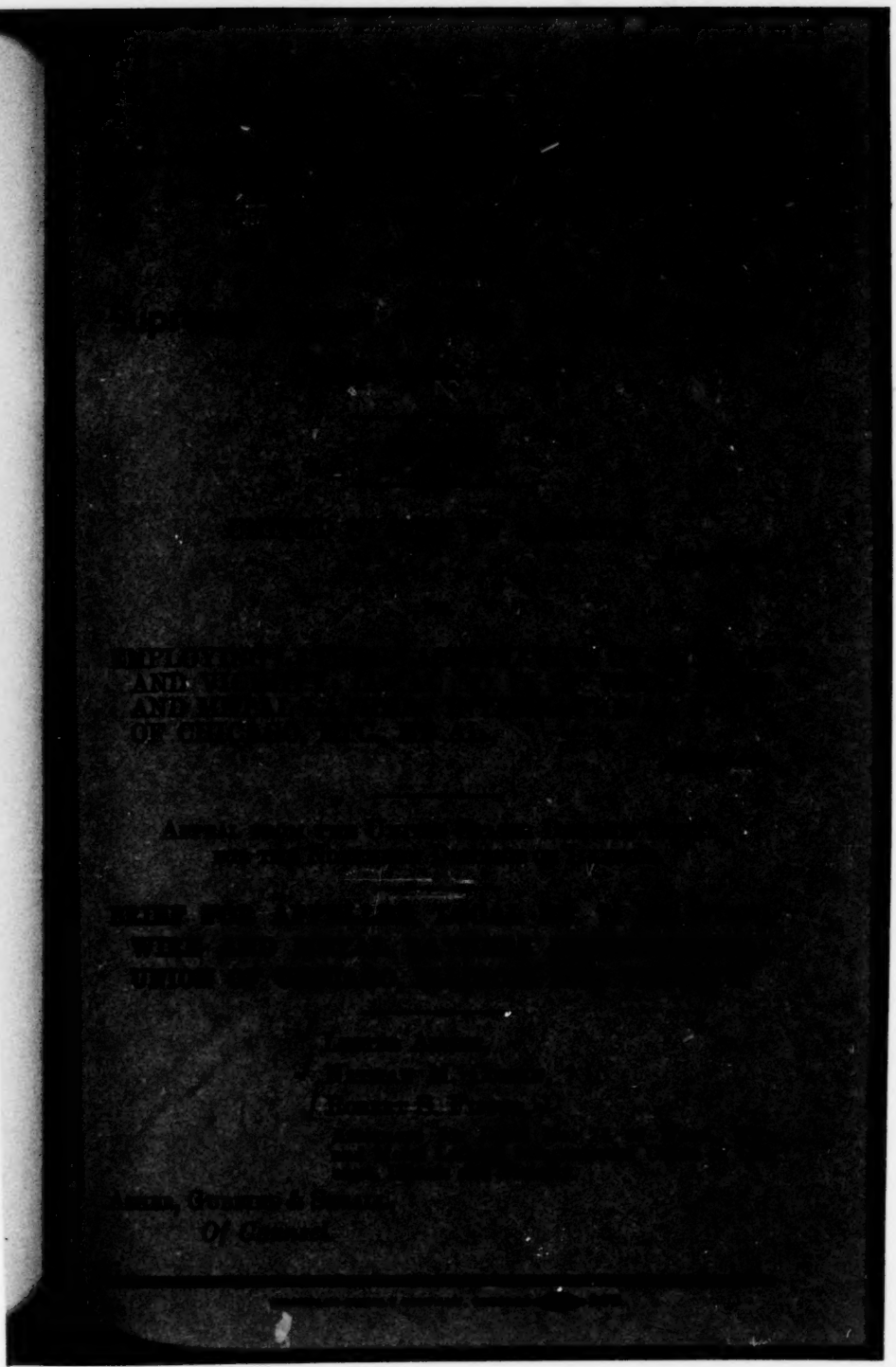
NATHAN M. COHEN,

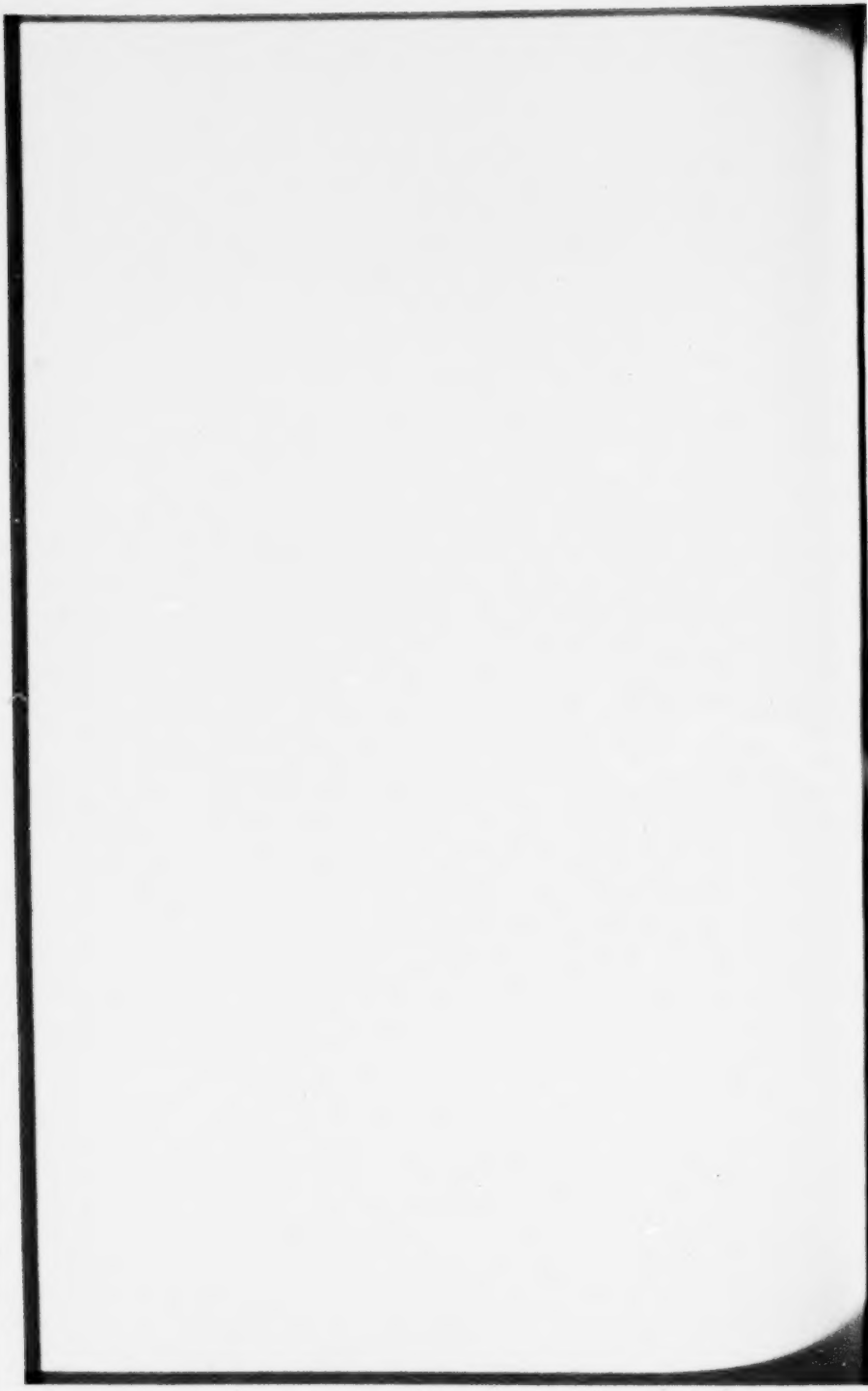
ROBERT S. FIFFER,

Attorneys for Local No. 74 of Wood, Wire and Metal Lathers International Union of Chicago, Illinois and Vicinity.

Appellee.

BLURRED COPY





BLEED THROUGH- POOR COPY

INDEX.

	PAGE
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Summary of argument	3
Argument	6
I. The complaint fails to allege a restraint of interstate commerce	6
A. The combination alleged is purely local	6
B. The purposes alleged are purely local. No intention to restrain interstate commerce is alleged	8
C. The complaint does not allege that appellees' activities have in fact had the effect of restraining interstate commerce	10
D. The complaint would be insufficient even if it alleged a diminution of the interstate flow of lathing materials resulting from appellees' locally-aimed activities	13
II. The Government's brief has not improved its complaint	17
A. The Government's brief does not explain away the failure of the complaint to allege that appellees conspired with the intention of restraining interstate commerce	17
B. The Government's brief does not explain away the failure of the complaint to allege that the alleged conspiracy in fact restrained interstate commerce	18
C. The Government's brief fails to show how a local conspiracy which does not restrain interstate commerce violates the Sherman Act	25
III. A decision upholding the complaint at bar would virtually emasculate the limited Clayton Act exemption remaining after the Allen Bradley case	31
Conclusion	34

BLURRED COPY

CITATIONS.

Cases.

Allen Bradley Co. v. Local Union No. 3, 325 U. S. 797 ..... 5, 31, 32
Anderson v. Shipowners' Association, 272 U. S. 359.. 8
Apex Hosiery Co. v. Leader, 310 U. S. 469..... ..... 5, 10, 29, 30, 31, 33
Atlantic Cleaners & Dyers v. United States, 286 U. S. 427 33
Browning v. Waycross, 233 U. S. 16 7
Carpenters Union v. National Labor Relations Board, 341 U. S. 707 30
Dooley v. Crist, 25 Ill. 453 19
Electrical Workers v. National Labor Relations Board, 341 U. S. 694 30
Fifield v. Farmers National Bank, 148 Ill. 163 19
Hopkins v. United States, 171 U. S. 578 ..... 4, 7
Industrial Association of San Francisco v. United States, 268 U. S. 64 ..... 5, 9, 14, 15, 16, 17, 28
Kansas City Steel Co. v. Arkansas, 269 U. S. 148 8
Levering & Garrigues Co. v. Morrin, 289 U. S. 103... ..... 5, 9, 15, 16, 17, 28
Local 167 v. United States, 291 U. S. 293 ..... 5, 12, 22
Lorain Journal Co. v. United States, 342 U. S. 143...25, 27
Mandeville Island Farms v. American Crystal Sugar Co., 334 U. S. 219 ..... 4, 12, 22, 23, 24, 25, 28
National Labor Relations Board v. Denver Building Council, 341 U. S. 675 ..... 12, 28, 29
Newport News Shipbuilding and Drydock Co. v. Schauffler, 303 U. S. 54 13
Schechter Poultry Corp. v. United States, 295 U. S. 495 ..... 8, 16, 33
Standard Oil Co. v. Federal Trade Commission, 340 U. S. 231 18
United States v. Building and Construction Trades Council, et al., 313 U. S. 539 8
United States v. Carrozzo, 37 F. Supp. 191 (N. D. Ill., E. D.) 8, 31

BLEED THROUGH– POOR COPY

United States v. Frankfort Distilleries, Inc., 324 U. S. 293 ..... 3, 16, 28
United States v. Hutcheson, 312 U. S. 219 8
United States v. International Hod Carriers and Common Laborers' District Council, et al., 313 U. S. 539 ..... 8, 31
United States v. Oregon State Medical Society, 343 U. S. 326 ..... 4, 7, 11, 16
United States v. Patten, 226 U. S. 525 ..... 4, 17
United States v. San Francisco Electrical Contractors Ass'n., 57 F. Supp. 57 (D. C., N. D., Calif., S. D.) 19
United States v. United Brotherhood of Carpenters and Joiners of America, et al., 313 U. S. 539 8
United States v. Women's Sportswear Mfg. Ass'n., 336 U. S. 460 ..... 4, 6, 8, 12, 22, 23, 25, 26, 27
United States v. Yellow Cab Co., 332 U. S. 218 ..... 4, 8, 11, 13
Walling v. Jacksonville Paper Co., 317 U. S. 564 18
White Way Sign Co. v. Chicago Title and Trust Co., 368 Ill. 483 19

Statutes.

Sherman Act, Act of July 2, 1890, 26 Stat. 209, as amended, 15 U. S. C. 1, et seq.:
Sec. 1 2
Sec. 4 2
Labor Management Relations Act, 1947, Act of June 23, 1947, 61 Stat. 136, 29 U. S. C. (Supp. III) 141, et seq.:
Sec. 2. (6) 29
Sec. 2 (7) 29
Sec. 10 (a) 29
Clayton Act, Act of October 15, 1914, 38 Stat. 731, 15 U. S. C. 17:
Sec. 6 ..... 3, 31

BLURRED COPY

BLEED THROUGH- POOR COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1953.

No. 439

UNITED STATES OF AMERICA,
Appellant,

vs.

EMPLOYING LATHERS ASSOCIATION OF CHICAGO AND VICINITY; LOCAL NO. 74 OF WOOD, WIRE AND METAL LATHERS INTERNATIONAL UNION OF CHICAGO, ETC., ET AL.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLEE, LOCAL NO. 74 OF WOOD, WIRE AND METAL LATHERS INTERNATIONAL UNION OF CHICAGO, ILLINOIS AND VICINITY.

OPINION BELOW.

The opinion of the District Court (R. 21) is not yet reported.

JURISDICTION.

This Court has jurisdiction in this appeal by virtue of Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. 29 as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869.

BLURRED COPY

QUESTION PRESENTED.

The complaint alleges an agreement between a local union and a local employers' organization to "suppress competition" in the intrastate market for the employers' services. The parties to the agreement work with, but never own, materials originating in other states. The parties use the materials in constructing improvements on Illinois real estate. The complaint does not allege that anything the parties have done was intended to or did in fact restrain the alleged interstate flow of materials into the local area.

The question presented is whether the complaint states a claim against the union and the employers' organization for which relief can be granted under Section 1 of the Sherman Act, solely because some of the materials used by the parties originate in other states.

STATUTES INVOLVED.

The Act of July 2, 1890, 26 Stat. 209, known as the Sherman Act, as amended, provides in part as follows:

> Section 1 [as amended by the Act of August 17, 1937, 50 Stat. 693]. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *. [15 U. S. C. 1.]
>
> * * * * * *
>
> Sec. 4 [as amended by the Act of March 3, 1911, 36 Stat. 1167]. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United

BLEED THROUGH– POOR COPY

States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * * [15 U. S. C. 4.]

* * * * * * *

The Act of October 15, 1914, 38 Stat. 730, known as the Clayton Act, provides in part as follows:

Section 6. The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws. [15 U. S. C. 17.]

STATEMENT.

All appellees have collaborated on the statement of the case presented which appears in the brief of our co-appellees. In order to conserve the time of the Court, we adopt that statement and incorporate it herein by reference.

SUMMARY OF ARGUMENT.

The trial court was correct in dismissing the complaint because it failed to allege that the conspiracy charged was intended to or did in fact restrain interstate commerce.

A. The conspiracy charged is stamped only with an intrastate character. The parties to it are all residents of Illinois and do not deal, among themselves or with others, across state lines. Cf. *United States* v. *Frankfort Distil-*

BLURRED COPY

leries, Inc., 324 U. S. 293. Appellees are not alleged to be themselves engaged in or a part of interstate trade in lathing materials, the only interstate commerce allegedly involved here. Their only contact with interstate commerce is that some of the materials used by them, originated in other states. See *Hopkins* v. *United States*, 171 U. S. 578.

B. Appellees have, at every stage of this proceeding, admitted that interstate commerce *may* be restrained by wholly intrastate activity. Hence, it is of no real consequence whether or not lathing materials are "in commerce" until they reach the employing lather. The relevant inquiry is whether the complaint alleges that this local conspiracy is intended to do or does in fact restrain, within the meaning of the Sherman Act, the interstate flow of lathing materials. *United States* v. *Women's Sportswear Assn.*, 336 U. S. 460, 461; *Mandeville Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219, 232. Assuming *arguendo*, that the conspiracy alleged was intended to and did in fact effect restraints on the intrastate market for lathing work, the complaint would still fail to state a claim for relief under the Sherman Act unless it further showed that there was imposed on the interstate flow of lathing materials the kind of market restraint at which the Sherman Act is aimed. *United States* v. *Oregon State Medical Society*, 343 U. S. 326, 338; *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 233.

C. The complaint ascribes to the local conspiracy only a local aim, and, as is shown, no "consequences" from which an intention to restrain interstate commerce may be presumed. Cf. *United States* v. *Patten*, 226 U. S. 525.

D. The complaint fails to allege that the local conspiracy does in fact restrain the interstate commerce allegedly involved. The allegations of effect in *Mandeville Farms* v.

BLEED THROUGH– POOR COPY

American Crystal Sugar Co., 334 U. S. 219, 226, were far more specific than those in the instant complaint. The complaint fails to allege that anything appellees have done has had any effect whatever on the entry, the volume, the price, the quality, competition in the sale, purchase or distribution of lathing materials and other building materials flowing into Illinois in interstate commerce. Cf. *Local 167* v. *United States*, 291 U. S. 293. The mere conclusion that anything which interferes with the performance of lathing work "necessarily and directly" restrains interstate commerce in lathing materials cannot substitute for the allegation of some actual and factual effect. Nor is it in accord with this Court's pronouncements as to the intent and scope of the Sherman Act in *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469.

E. Even if the complaint alleged a diminution of the interstate flow of lathing materials, which it does not do, such an indirect, incidental and remote effect of a locally-aimed conspiracy is beyond the intent of the Sherman Act. *Industrial Association of San Francisco* v. *United States*, 268 U. S. 64; *Levering & Garrigues Co.* v. *Morrin*, 289 U. S. 103. If, therefore, appellees are not alleged to have gone as far as the defendants in the foregoing cases, *a fortiori* the instant complaint fails to state a claim for which relief can be granted under the Sherman Act.

F. A decision here that a local employer-union combination with purely local aims violates the Sherman Act simply because the materials with which the parties work, but do not own, originate in other states, without requiring an allegation that the combination does in fact restrain interstate trade in those materials, would virtually emasculate the limited Clayton Act exemption remaining after *Allen Bradley Co.* v. *Local Union No. 3*, 325 U. S. 797. To make the availability of the Clayton Act exemption to this appel-

BLURRED COPY

lee dependent solely on whether the local employer-union combination uses materials originating in other states is tantamount to holding that local building tradesmen and local building trades unions are themselves engaged in and a part of interstate commerce.

I.

THE COMPLAINT FAILS TO ALLEGE A RESTRAINT OF INTERSTATE COMMERCE.

> "We first should be satisfied that the activities on which restraints are alleged to have been exerted constitute commerce among states." *United States* v. *Women's Sportswear Assn.*, 336 U.S. 460, 461.

A. The Combination Alleged Is Purely Local.

The complaint alleges (par. 3, R. 2) that each of the appellees is located and does business in the "Chicago area." All allegations relating to the substance of the charge are limited to the "Chicago area," which is defined (par. 7, R. 3) to include "most of Cook County and portions of DuPage and Lake Counties, Illinois."

The complaint alleges certain agreements among the appellees which concern the service rendered by employing lathers [1] in the Chicago area and the conditions under which the members of this appellee-union will work for employing lathers. The service provided by the employing lathers is performed entirely within the State of Illinois, and both the employing lathers and those with whom they contract, reside and work solely within the state. Nothing is alleged to indicate that any of the parties, in their activities alleged in the complaint, have dealt with each other across state lines, or have dealt with anyone else residing or doing business outside the State of Illinois.

[1] In common with our co-appellees, we consider the term "lathing contractors" to be an inaccurate description of the function of the employing lathers, and shall refer to them herein as "employing lathers."

BLEED THROUGH– POOR COPY

The only contact between appellees and interstate commerce, which the complaint alleges, is that some of the materials furnished by the plastering contractors to the employing lathers originated in other states.

The Government wisely does not proceed on the premise that the appellees are themselves engaged in or a part of interstate commerce, for it is clear that they are not.[2] See *United States* v. *Oregon State Medical Society*, 343 U.S. 326.

An analogous situation was considered by this Court in *Hopkins* v. *United States*, 171 U.S. 578, wherein there was a combination of commission merchants at the Kansas City stockyards which prescribed the commissions to be charged for selling livestock consigned to the defendants from cattlemen in other states. The Court held that this combination did not violate the Sherman Act, stating at page 591:

> "Granting that the cattle themselves, because coming from another state, are articles of interstate commerce, yet it does not therefore follow that before their sale all persons performing services in any way connected with them are themselves engaged in that commerce, or that their agreements among each other relative to the compensation to be charged for their services are void as agreements made in restraint of interstate trade."

In *Browning* v. *Waycross*, 233 U.S. 16, this Court held that a Georgia resident engaged in the business of erecting lightning rods which originated in Missouri, was not engaged in interstate commerce. At page 22 the Court said:

> "* * * such business was wholly separate from interstate commerce, involved no question of the delivery of property shipped in interstate commerce or of the right to complete an interstate commerce trans-

[2] The Government's determination to drop its charge of monopolization (see footnote 2, Brf. 4) is a tacit admission of this point.

BLURRED COPY

action, but concerned merely the doing of a local act after interstate commerce had terminated."

See also *Kansas City Steel Co.* v. *Arkansas,* 269 U.S. 148; *Anderson* v. *Shipowners' Association,* 272 U.S. 359, 363-364; *United States* v. *Yellow Cab Co.,* 332 U.S. 218, 228-233; Cf. *United States* v. *Hutcheson,* 312 U.S. 219, particularly concurring opinion of Mr. Justice Stone, at pages 237-243; *United States* v. *Building and Construction Trades Council, et al.,* 313 U.S. 539; *United States* v. *United Brotherhood of Carpenters and Joiners of America, et al.,* 313 U.S. 539; *United States* v. *International Hod Carriers and Common Laborers' District Council, et al.,* 313 U.S. 539, affirming *United States* v. *Carrozzo,* 37 F. Supp. 191 (N.D. Ill., E.D.).

There is nothing alleged in the complaint which detracts from the conclusion that the combination alleged is purely local, and that the parties to it are not themselves engaged in interstate commerce. It is clear, therefore, that in order to plead a violation of the Sherman Act, it was incumbent upon the appellant to allege that the local activities of the appellees are intended to, or do in fact have the effect of, restraining interstate commerce in lathing materials. *United States* v. *Women's Sportswear Assn.,* 336 U.S. 460, 461. See *Schechter Poultry Corp.* v. *United States,* 295 U.S. 495, 547.

B. The Purposes Alleged Are Purely Local. No Intention To Restrain Interstate Commerce Is Alleged.

The complaint carefully, and with considerable art, avoids alleging any intention on the part of the appellees to restrain interstate commerce. Paragraph 19 of the complaint (R. 6) alleges that appellees "* * * have engaged in an unlawful combination and conspiracy *to suppress competition among lathing contractors in the Chicago area, and to restrict and exclude persons from engaging in the*

BLEED THROUGH– POOR COPY

lathing contracting business in said area * * *." These purely local aims are the only purposes attributed to the appellees.

Paragraph 20 of the complaint (R. 6) which sets forth the terms of the alleged combination and conspiracy nowhere mentions any intention on the part of appellees to restrain the interstate flow of lathing materials and related building materials. Nor do paragraphs 21 through 28 of the complaint (R. 7-9) anywhere allege that the intention, object, or aim of the alleged combination and conspiracy was to restrain such interstate commerce. In fact, nowhere does the complaint speak of any intention on the part of appellees to restrain the interstate flow of lathing materials and related building materials, which is the only interstate commerce referred to anywhere in the complaint.

In *Industrial Association* v. *United States*, 268 U.S. 64, the Court said (p. 77) of a combination of building trades employers whose purpose was to compel all San Francisco building contractors to adhere to the "open shop," by allowing only those contractors who cooperated to obtain materials and supplies:

> "* * * Interference with interstate trade was neither desired nor intended. * * * The thing aimed at and sought to be attained was not restraint of the interstate sale or shipment of commodities, but was a purely local matter, namely, regulation of building operations within a limited local area, so as to prevent their domination by the labor unions. * * *"

In *Levering & Garrigues Co.* v. *Morrin*, 289 U. S. 103, it was charged that the defendant union had interfered with the performance of structural steel construction work in New York City for the purpose of compelling contractors to adopt the "closed shop." This Court affirmed dismissal of the bill as failing to state a claim under the Sherman Act, stating (p. 107):

BLURRED COPY

> "* * * the sole aim of the conspiracy was to halt or suppress local building operations as a means of compelling the employment of union labor, not for the purpose of affecting the sale or transit of materials in interstate commerce. *Use* of the materials was purely a local matter, and the suppression thereof the result of the pursuit of a purely local aim."

In *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, the Court squarely established that an intention to restrict the interstate movement of goods, standing alone, does not constitute an intention to restrain interstate commerce within the meaning of the Sherman Act. Since no intention to restrict interstate movement is alleged here, appellees are not even alleged to be as close to violating the Act as the defendants in the *Apex* case had been proved to be.

Thus, it is clear that the complaint alleges no intention on the part of appellees to restrain interstate commerce.

C. The Complaint Does Not Allege that Appellees' Activities Have in Fact had the Effect of Restraining Interstate Commerce.

Since the complaint ascribes only local aims to the appellees and fails to allege any intention to restrain interstate commerce, or any other aim from which such an intention may be inferred, the complaint can be sufficient in law only if it alleges facts showing that the effects of the appellees' activities upon interstate commerce were such as to restrain that commerce directly and substantially.

It may be stated categorically that the complaint does not allege one fact showing that any of the activities of the appellees at any time obstructed, interrupted, hindered, impeded, burdened, restrained, disrupted or in any way affected interstate commerce in lathing materials.

BLEED THROUGH– POOR COPY

The effects alleged are set forth in paragraph 29 (R. 9) of the complaint.[3] Of the five effects listed, four relate only to intrastate commerce.[4]

Assuming, *arguendo*, that the conspiracy alleged was intended to and did in fact effect restraints on the intrastate market for lathing work, the complaint would not state a claim for relief under the Sherman Act unless it further showed that there was imposed on the interstate flow of lathing materials the kind of restraint at which the Sherman Act is aimed. *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 338; *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 233.

Only one of the effects alleged relates to the interstate commerce said by appellant to be involved in this action. Sub-paragraph 29 (e) states: "Interstate trade and commerce in lathing and related building materials has been unlawfully restrained." Nowhere in the complaint is there a single allegation of fact supporting this broad conclusion.

---

[3] "29. The effects of the aforesaid combination and conspiracy, among others, have been as follows:

(a) The number of lathing contractors in the Chicago area has been reduced from approximately 95 in 1925 to approximately 36 at the present time and the right of union contractors to hire union journeymen lathers and apprentices has been unlawfully restrained and impeded;

(b) Competition among lathing contractors in the Chicago area has been unlawfully restrained and the traditional American right of a person to enter into a business of his own choice without hindrance of illegal restraints of trade has been impaired and thwarted;

(c) The cost of building construction in the Chicago area has been artificially and illegally increased;

(d) The public has been denied the benefits in the construction industry in the Chicago area which would result from competition free from the illegal restraints in the lathing phases of the building construction industry;

(e) Interstate trade and commerce in lathing and related building materials has been unlawfully restrained."

[4] It should be noted that the conclusion in paragraph 29 (c) that "The cost of building construction in the Chicago area has been artificially and illegally increased;" is unsupported in the complaint. No charge is made that the prices of lathing work or materials or plastering work or materials have been increased as a result of anything the defendants are alleged to have done.

BLURRED COPY

The complaint does not allege that anything appellees have done:

> (a) physically restrained the entry (Cf. *Local 167* v. *United States,* 291 U.S. 293);
>
> (b) reduced, increased or affected in any way the volume (Cf. *N. L. R. B.* v. *Denver Bldg. Council,* 341 U.S. 675);
>
> (c) raised, lowered, influenced or in any way affected the price (Cf. *Mandeville Farms* v. *American Crystal Sugar Co.,* 334 U. S. 219 and *United States* v. *Women's Sportswear Assn.,* 336 U.S. 460);
>
> (d) raised, lowered, influenced or in any way affected the quality;
>
> (e) restricted competition in the sale (Cf. *Local 167* v. *United States, supra*);
>
> (f) restricted competition in the purchase (Cf. *Local 167* v. *United States, supra*), or
>
> (g) restricted competition in the distribution (Cf. *Local 167* v. *United States, supra*),

of lathing and other building materials flowing into Illinois in interstate commerce.

If the complaint alleges no physical restraint, no effect on quantity, price, quality, competition in sale, competition in purchase, competition in distribution, where can it be said that it alleges a restraint on interstate commerce in lathing and building materials coming into Illinois?

In an effort to fill this void, appellant relies on paragraph 18 of its complaint (R. 5). That paragraph is as follows:

> "*Any* restraint upon or disruption in or interference with the performance of lathing work in the Chicago area *necessarily* and *directly* restrains and affects the interstate flow of lathing materials and also constitutes a direct and substantial burden and restraint upon the interstate flow of all of the hereinbefore referred to building materials and appurtenances entering into the construction of buildings in the Chicago area." (Emphasis added.)

BLEED THROUGH– POOR COPY

A bald conclusion of this nature is not, of course, admitted by a motion to dismiss. *Newport News Shipbuilding and Drydock Co.* v. *Schauffler,* 303 U.S. 54, 57; *United States* v. *Yellow Cab Co.,* 332 U.S. 218.

Paragraph 18 is a cornerstone of the Government's complaint. It is this broad, all-inclusive supposition, that *anything* which interferes with the performance of lathing work restrains interstate commerce in lathing materials and other building materials *per se,* on which the Government bases its complaint. Without dwelling on the fact that the complaint does not allege any interference with the performance of lathing work, the failure to allege any actual or factual effect of the defendants' activities upon interstate commerce in lathing materials is patent.

Since the complaint in issue fails to allege any facts showing that the activities of the appellees have in any way had the effect of restraining interstate commerce in lathing materials and building materials, and since we have already established that the complaint does not allege that appellees intended to restrain interstate commerce, it follows that the complaint is fatally defective, *United States* v. *Yellow Cab Co.,* 332 U.S. 218, 233, and was properly dismissed by the trial court.

D. The Complaint Would Be Insufficient Even if it Alleged a Diminution of the Interstate Flow of Lathing Materials Resulting from Appellee's Locally Aimed Activities.

Cases involving the Sherman Act consistently require direct and substantial restraints of interstate trade, rather than remote and incidental restraints on interstate trade and commerce. Assuming *arguendo,* that the complaint had alleged facts showing that as a result of the local appellees' locally-aimed activities the volume of lathing and building

BLURRED COPY

materials coming into the Chicago area from other states had been diminished, it would still fall short of alleging direct and substantial restraints violating Section 1 of the Sherman Act.

A case in which a rigid system of control was imposed upon a local construction industry was *Industrial Association* v. *United States,* 268 U.S. 64. That case involved a local combination which required builders to obtain permits for the purchase of building materials from the Builders' Exchange, and by refusing such permits, forced all builders to operate on the "open shop" plan of employment. Some of the material controlled by this plan was plaster which originated outside of the State of California. Despite a finding by the trial court (pp. 76-77) that the requirement of permits "interfered with and prevented the free movement of building materials and supplies from other states into California," this Court reversed the trial court's order granting an injunction against the Industrial Association, stating (page 80) that the effects of the conspiracy:

> "* * * went no further than to take away the * * * (local contractor's) opportunity to use, and therefore, his incentive to purchase. The effect upon, and interference with, interstate trade, if any, were clearly incidental, indirect and remote, * * *."

Continuing, the Court stated at page 82:

> "* * * if, by a resulting diminution of the commercial demand, interstate trade was curtailed either generally or in specific instances, that was a fortuitous consequence so remote and indirect as plainly to cause it to fall outside the reach of the Sherman Act."

Thus even where a trial court has found proven effects more substantial and more direct than those which the Government hints at but does not allege in the instant complaint, this Court has refused to invoke the Sherman Act.

BLEED THROUGH– POOR COPY

Especially applicable to the allegations in the complaint herein, is the following language of the Court in the *Industrial Association* case (page 84):

> "To extend a statute intended to reach and suppress real interferences with the free flow of commerce among the states to a situation so equivocal and so lacking in substance, would be to cast doubt upon the serious purpose with which it was framed."

Similarly, *Levering & Garrigues Co.* v. *Morrin,* 289 U.S. 103, held that curtailments of shipments in interstate commerce as a result of the local means employed by a local conspiracy with local aims is beyond the reach of the Sherman Act. In that case it was alleged that:

> "• • • all the steel used by petitioners • • • is transported from other states • • •; that the purpose and intent of respondents is to prevent the use of said steel • • • wherever erected by petitioners; that the effect of the success of respondents would be • • • to destroy the interstate traffic of petitioners in steel." (pp. 106-107.)

This Court held that such effects, which go far beyond those alleged in the instant complaint, were not such as could invoke the Sherman Act, stating at page 107:

> "All this, however, is no more than to say that respondents' interference with the erection of the steel in New York will have the effect of interfering with the bringing of the steel from the other states. • • •"

As in the *Industrial Association* case the effect of the conspiracy was to prevent the purchase and shipment of materials from other states. Yet, the Court in the *Levering* case held (page 107) that:

> "• • • Restraint of interstate commerce was not an object of the conspiracy. Prevention of the local use was in no sense a means adopted to effect such a restraint. It is this exclusively local aim, and not

BLURRED COPY

> the fortuitous and incidental effect upon interstate commerce, which gives character to the conspiracy. * * * If thereby the shipment of steel in interstate commerce was curtailed, that result was incidental, indirect and remote, and therefore not within the Anti-Trust Acts * * *."

In *Schechter Poultry Corp.* v. *United States,* 295 U.S. 495, the Court said at page 547:

> "The distinction between direct and indirect effects has been clearly recognized in the application of the Anti-Trust Act. Where a combination or conspiracy is formed, with the intent to restrain interstate commerce or to monopolize any part of it, the violation of the statute is clear. * * * But where that intent is absent, and the objectives are limited to intrastate activities, the fact that there may be an indirect effect upon interstate commerce does not subject the parties to the federal statute, notwithstanding its broad provisions. * * *"

It is thus clear that the complaint at bar would be insufficient, even if it contained complete factual allegations showing that the volume of lathing and building materials flowing into the Chicago area had been sharply curtailed as a result of the local appellees' locally-aimed activities. For even if such were the case, the conspiracy would not have imposed on the interstate market for lathing materials the type of restraint at which the Sherman Act is aimed.

The activities of the defendants in the *Industrial Association* and *Levering* cases were held to be beyond the intent of the Sherman Act. This Court, the Government to the contrary (Brf. 31), has recently indicated that it still deems these cases illuminating, *United States* v. *Oregon State Medical Society,* 343 U.S. 326, 339; *United States* v. *Frankfort Distilleries, Inc.,* 324 U.S. 293, 297. The Government here asks the Court to overturn those decisions on purely semantic grounds. Since the *Levering* and *Indus-*

BLEED THROUGH– POOR COPY

trial Association cases were decided, the Government has developed new names for some old activities. Contractors and workmen in the building trades are now described variously as "conduits" (Complaint, paragraph 15; R. 5), "terminal outlets" (Brf. 12) and "outlets for entry" (Brf. 26). The activities have not changed. Only the labels are new. Local building tradesmen worked with materials originating in other states in 1925, when the *Levering* case was decided, in 1933 when the *Industrial Association* case was decided, and they do today. The use of the terms "conduit," "terminal outlet" and "outlets for entry" has not changed the *facts*.

If, therefore, as has been shown, appellees are not alleged to have gone as far as the defendants in the earlier cases cited, *a fortiori* their alleged activities should not now be held to be within the intent of the Sherman Act.

II.

THE GOVERNMENT'S BRIEF HAS NOT IMPROVED ITS COMPLAINT.

A. The Government's Brief Does Not Explain Away the Failure of the Complaint to Allege that Appellees Conspired with the Intention of Restraining Interstate Commerce.

The trial court found that the complaint contained "* * * no allegation showing these defendants intended to burden interstate commerce by this alleged conspiracy." The Government cites (Brf. 28-29) *United States* v. *Patten*, 226 U.S. 525, 543 for the proposition that " 'no allegation of a specific intent to restrain' interstate commerce is necessary" and that "those charged with conspiracy 'must be held to have intended the necessary and direct consequences of their acts'."

BLURRED COPY

Admitting this to be the law, it must follow that the presumption will not become operative unless the consequences of the appellees' acts are alleged in the complaint. It is the consequences—the effects on interstate commerce —which have not been pleaded in the instant complaint. Hence, there is nothing alleged from which an intent to restrain interstate commerce in lathing materials may be inferred.

B. The Government's Brief Does Not Explain Away the Failure of the Complaint to Allege that the Alleged Conspiracy in Fact Restrained Interstate Commerce.

In Section A of its argument, which section is entitled, "The Lathing Materials Shipped From States Other Than Illinois Remain In Interstate Commerce Until They Reach The Lathing Contractors For Whom They Are Destined." appellant seeks to establish that the lathing materials in the hands of appellees are articles "in" interstate commerce. The theory is that lathing materials, like paper cups (Cf. *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564) or gasoline (*Cf. Standard Oil Co.* v. *Federal Trade Commission,* 340 U.S. 231) are finished products, sold and distributed through local wholesale outlets (the building material dealers) and local retail outlets (the plastering contractors) to individual purchasers (the general contractors or the building buyers).

The complaint itself shows the basic fallacy of the theory.[6] The Government in its brief (p. 2) erroneously asserts that its complaint alleges that the employing lathers contract to *furnish* as well as install lathing materials. This assertion misrepresents the complaint which is explicit (par. 8, R. 3; par. 12, R. 4) that the lathing ma-

[6] The bald conclusion that general contractors or building owners are the ultimate purchasers of lathing materials is, of course, not admitted by the motion to dismiss.

BLEED THROUGH– POOR COPY

terials are furnished by the plastering contractors to the employing lathers. This is done so that the plastering contractors may fulfill their contracts for the construction of walls in buildings. The employing lathers hire lathers to use (or consume) these materials in the construction of walls. Once the materials have reached the plastering contractors, they are never again articles of commerce, interstate or intrastate. For it is the function indeed the contractual obligation of the plastering contractors, with the aid of the appellees, to destroy the individual characters and identities of the materials by moulding them into walls of Illinois buildings and thus to make them a part of Illinois real estate. See *White Way Sign Co.* v. *Chicago Title and Trust Co.*, 368 Ill. 483; *Dooley* v. *Crist*, 25 Ill. 453; *Fifield* v. *Farmers National Bk.*, 148 Ill. 163.

Into these walls go not only lathing materials, but lumber, nails, plaster, and the skills of all the contractors, supervisors, and laborers involved. Lathing materials, once they have been installed by appellees, no longer exist as such. Lathing materials are consumed in the building of walls just as an artist "installs" paint in the "construction" of a painting. It would seem far-fetched to describe a collector who purchases a painting at the local gallery as the "ultimate purchaser" of the paint. It seems equally far-fetched to describe a general contractor or home buyer as the "ultimate purchaser" of lathing materials. (See Complaint, par. 8, R. 3.)

The best judicial articulation of this point which this appellee has found is in the opinion of Judge Yankwich in *United States* v. *San Francisco Electrical Contractors Ass'n.*, 57 F. Supp. 57 (D. C., N. D., Calif. S. D.). If the term "plastering contractor" is substituted for the term "electrical contractor," the following excerpt from page 65 of that opinion is seen to fit perfectly the instant case.

BLURRED COPY

"But the contractors *did not sell* electrical supplies to the public or to general contractors. They built, what the indictment calls, 'electrical systems,' which it defines as 'that *combinatoin* of electrical equipment by which electric current is carried into and distributed through residences, apartment houses, and other types of buildings within the San Francisco Bay Area.' (Italics added.)

"Many of the articles which went into the construction of these systems originated in interstate commerce. They were shipped by the manufacturers to their agents, upon whose local shelves they rested until purchased by electrical contractors to be used in assembling or building the electrical systems.

"At times, some articles were shipped direct from the manufacturers to a contractor. But this was done through the local sales agent, who billed the contractor for them.

"Adopting a broad view of the doctrine of the continuity of the flow in interstate commerce (*Local 167 of I. B. of Teamsters, etc.* v. *United States,* 1934, 291 U. S. 293, 297, 54 S. Ct. 396, 78 L. Ed. 804), there is no such continuity here.

"*The electrical contractor does not buy articles in interstate commerce for resale. He buys them locally, for his own use in building electrical systems.*

"When he bids on a job, he agrees to install an electrical system. His charges are for the completed system. Into the making of his price go electrical articles, cost of the labor of others, his own engineering skill in installing the various parts and combining them into a working whole, his own cost of doing business, and his profits of management.

"In other words, the electrical contractor processes the electrical articles into a combination which he sells at a price, in which enters, *as only one* of the elements, the price of the articles.

"When articles originating in interstate commerce thus become commingled in a locally completed process, *they are not* in the flow of commerce.

BLEED THROUGH– POOR COPY

"The continuity is broken, if not when they reach the shelves of the manufacturer's agent, *at the latest when they are purchased from* him by the contractor, not for resale, but for processing.

• • • • • •

"If processing and control before an article enters interstate commerce, although 'preparatory to interstate sale and shipment' is outside of that commerce. (See *Parker* v. *Brown*, 1943, 317 U. S. 341, 361, 63 S. Ct. 307, 318, 87 L. Ed. 315), why should 'processing' after the interstate journey is at an end be treated differently?[3] "

Footnote 3, added by Judge Yankwich, appears at pages 65 and 66 of the opinion and states in part as follows:

"By 'processing' I really mean 'construction.'

"In the strictly 'processing' cases, there is no 'building' of a system. There is but a change in an object which continues to retain its identity, such as the slaughtering and dressing of chickens, the dressing of furs, the grinding of a lens from a lens blank, or the cleaning, stemming or packing of raisins.

• • • • • •

"Here there is the construction of a system, which in its very making became a part of a building to which it was attached. By the law of fixtures, it became a part of the land on which the building stood. Certainly, the 'system' could not be the object of interstate commerce, for it was never in it. It came into being locally in the state, and never had a detached existence, rendering it capable of *being traded in interstate commerce,* although some of its parts originated in it."

Appellees, who are not purchasers of lathing materials, are a step further from interstate commerce in the materials than are the plastering contractors.

While it is recognized that this district court decision is not controlling, it is respectfully submitted that the analysis quoted is sound and should prevail in the instant cause.

BLURRED COPY

This point was fully understood by the trial court, which said in its opinion: (R. 23)

> "Whatever restraint there is occurs after all the buying and selling is completed. The flow of commerce is not unlike the flow of water, and the statute is designed to prevent a break in the pipes through which interstate commerce flows across state lines and to the consumer. The statute is not designed to apply to the use the consumer makes of the articles of commerce after the consumer has completed his purchase, unless the consumer creates a new product and a new stream of commerce that again crosses state boundary lines."

The error of the Government's theory is clear. Appellees are not "conduits," "terminal outlets," or "outlets for entry" of lathing materials or anything else. They are builders of walls and ceilings.

Having argued that lathing materials are in commerce, or as the Government phrases it, have an "interstate character" in the hands of the appellees, the Government next admits that it makes no difference whether or not the lathing materials are in interstate commerce, citing *United States* v. *Women's Sportswear Assn.*, 336 U.S. 460, 464; *Local 167* v. *United States*, 291 U.S. 293, 297; and *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219, for the patent proposition that it is not necessary to determine the precise point at which interstate commerce ends and intrastate commerce begins.

Admittedly, all that is necessary is that the activities complained of restrain interstate commerce. As this Court said in the *Women's Sportswear* case:

> "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." (p. 464.)

In the instant case, the trial court held that the Government had failed to allege that interstate commerce in lath-

BLEED THROUGH– POOR COPY

ing materials feels any pinch. Unlike the lower court in the *Women's Sportswear* case, which based its dismissal "chiefly on the grounds that the accused Association and its members were not themselves engaged in interstate commerce," the trial court in the instant case based its order of dismissal on the Government's failure to allege any effects of appellees' activities on the interstate commerce allegedly involved.

In its memorandum opinion, the trial court said: (R. 23-24)

> "There is no allegation of any effect of the alleged intrastate conspiracy upon the interstate market price of the building material involved. There is no allegation of any discrimination or anything that would cause a purchaser to buy building material in Wisconsin or in Chicago or in California. There is no allegation of fact of its effect upon the flow of materials into the State of Illinois. * * *
>
> "* * * *It is purely conjectural whether the practice with which the defendants are charged may remotely and indirectly effect the flow of interstate commerce.* It might be that it has reduced the number of buildings that are built in three counties in Illinois; it might be it has driven building and industry elsewhere; but that is not alleged. * * *
>
> "There is no allegation showing these defendants intended to burden interstate commerce by this alleged conspiracy. There is no allegation of fact that it does so burden interstate commerce." (Emphasis added.)

Appellant argues at page 22 of its brief that the charge of effect on interstate commerce is not "defective by reason of failure to set forth a precise blueprint or detailed catalogue of such effect * * *" and proceeds to assert that "The allegations here are at least as specific as those held to be adequate in *Mandeville Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219."

BLURRED COPY

There is no foundation whatsoever for the foregoing statement. The heart of the amended complaint in the *Mandeville* case is set forth in footnote No. 6 of this Court's opinion at page 226 of 334 U.S. Paragraph XIX of that amended complaint was as follows:

> "By reason of the foregoing acts of the defendants and its said conspirators, *interstate commerce in sugar was illegally restrained, competition therein was not only substantially lessened, but was destroyed, the price of sugar beets was illegally fixed,* and an illegal monopoly was established, all in violation of the anti-trust laws of the United States to the damage of plaintiffs as aforesaid." (Emphasis added.)

There is in the instant complaint no comparable allegation that competition in interstate commerce in lathing materials was lessened, substantially or otherwise. Nor is there any allegation of price-fixing. There is nothing in the Government's complaint in the instant cause which even remotely approaches the definiteness of the foregoing allegation in the *Mandeville* complaint, which is, perhaps the least specific and least factual of all the allegations in that complaint.

This defendant does not maintain that the Government must set forth a "precise blueprint" or a "detailed catalogue" of the effects on interstate commerce. Details are certainly unnecessary, but the allegation of the *effects* themselves is essential. As has been demonstrated, the complaint alleges nothing but the vague, generalized and indefinite conclusion that interstate trade and commerce in lathing and related building materials has been unlawfully restrained [par. 29(e), R. 9]. Not one word is alleged which indicates how or to what extent this interstate commerce is restrained.

If, as the Government states in paragraph 18 (R. 5) of its complaint, *any* restraint upon or disruption in or interfer-

BLEED THROUGH– POOR COPY

ence with the performance of lathing work in the Chicago area *necessarily* and *directly* restrains and affects the interstate flow of lathing materials, these restraints and effects could easily have been pleaded. What are these effects which are so necessary and direct? Was the flow of materials reduced? If so, the Government should say so. Were the prices of the materials increased or fixed? If so, the Government should say so.

If the alleged conspiracy is unlawful because it intended to achieve unlawful ends, then those intentions must be alleged. If it is unlawful because it had unlawful effects, then those effects must be alleged. In the case at bar the Government has alleged neither.

C. The Government's Brief Fails to Show How a Local Conspiracy Which Does Not Restrain Interstate Commerce Violates the Sherman Act.

The Government devotes much of its brief developing the obvious point that a local conspiracy may violate the Sherman Act if it restrains interstate commerce. To this end it cites, among other cases, *U.S.* v. *Women's Sportswear Mfrs. Ass'n.*, 336 U. S. 460; *Lorain Journal Co.* v. *U.S.*, 342 U.S. 143; and *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219.

This appellee does not dispute the validity of this proposition as a general principle of anti-trust law. The major premise of the Government's syllogism is conceded. But the Government has proceeded directly to its conclusion without stating in its complaint the necessary minor premise, to wit, that the locally-aimed conspiracy of local parties in the instant cause is intended to restrain or has in fact the effect of restraining interstate commerce in lathing materials. It is respectfully submitted that the Government's "logic" is illogical.

BLURRED COPY

The Government states (Brf. 24-25):

> "• • • both economic fact and controlling precedent must be ignored to conclude that, because they are 'local,' restraints in the building trades *cannot* affect the interstate flow of materials which move for the single purpose of use in these trades. And only such a fallacious conclusion could explain the decision below."

No such contention has ever been advanced by appellees, nor did the trial court rest its decision on such tenuous grounds. We would remind the appellant, however, that it is incumbent on the Government, as it is on every plaintiff, to allege a claim which relief can be granted.

None of the cases relied on by the Government holds that a local conspiracy, neither aimed at nor in fact effecting restraints on interstate commerce, violates the Sherman Act. On the contrary, the essence of each case cited is the holding that the local conspiracy involved clearly *did* restrain interstate commerce. In the *Women's Sportswear* case, for instance, the Court said of the operation in question, at pages 461 and 462 of 336 U.S.:

> "That the jobbers maintain a current of commerce, substantial in volume and interstate in character, seems clear. • • • *At least 80% of the finished sportswear is sold and shipped to customers outside of that State.* Thus the industry in Massachusetts subsists on a constant influx of cloth *and outgo of garments* which pass through the hands of the stitching contractors for an essential operation." (Emphasis added.)

The Court found that the "cost of this contractor's operation is about 25% of the jobber's sale price, and its variations are reflected in wholesale and retail prices." (p. 462). Thus the restrictive practices of the defendants manifested themselves in the prices of the 82% of the garments shipped out of Massachusetts, after defendants had worked on them,

BLEED THROUGH– POOR COPY

and sold in other states. The Court said (p. 464): *"The business affected by the restraint is interstate commerce."* This determination by the Court was clearly correct because in the *Women's Sportswear* case, unlike the case at bar, interstate shipments followed the point at which the defendants' activities occurred, and the restraints imposed by the defendants therefore directly affected prices in the interstate market for the goods there involved. No such effect on the interstate flow of lathing materials has been alleged in the complaint at bar.

In *Lorain Journal Co.* v. *United States*, 342 U. S. 143, the defendant's attack on interstate commerce was found to be intended and actual. In that case, the defendant newspaper was attempting to force a competing radio station out of business. The Court held (p. 151) that, "• • • the immediate dissemination of news gathered from throughout the nation or the world by agents specially organized for that purpose is a part of interstate commerce." Accordingly, the Court held that the defendant's efforts to force the competing radio station out of business constituted an attempt to monopolize a part of interstate commerce under the Sherman Act.

Contrast the instant case where appellees are not alleged to be themselves engaged in interstate commerce. They have no dealings across state lines, as do newspaper publishers and radio station operators engaged in the immediate dissemination of news. They do not import lathing materials from other states, as newspapers import news and advertising. Nor do they sell lathing materials as newspapers sell the news and advertising they have imported. The irrelevance of the *Lorain Journal* case in this proceeding is apparent, despite the Government's efforts to give the case a significance it does not have.

BLURRED COPY

The Government cites *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219, but neglects to point out the peculiarly high degree of integration of the interstate and intrastate phases of the beet sugar industry, a point which was repeatedly emphasized by the Court. At page 225, the Court referred to *"the industry's unique structure and special mode of operation."* (Emphasis added.) Again at page 239, the Court said: "We deal here, • • • with *an industry tightly interwoven from sale of the seed through all the intermediate stages to and including interstate sale and distribution of the sugar."* (Emphasis added.)

The Government also neglects to state that the Court distinguished the type of case now at bar by saying at page 234:

> "• • • the inquiry whether the restraint occurs in one phase or another, interstate or intrastate, of the total economic process is now merely a preliminary step, *except for those situations in which no aspect of or substantial effect upon interstate commerce can be found in the sum of facts presented.* • • •" (Emphasis added.)

To amplify this statement the Court, in footnote No. 14, quoted from *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293, and listed among the cases cited there, *Industrial Association* v. *United States*, 268 U. S. 64, and *Levering & Garrigues Co.* v. *Morrin*, 289 U. S. 103. It is in the category of these cases that the case at bar clearly falls.

The Government relies heavily, but erroneously, on *National Labor Relations Board* v. *Denver Building Council*, 341 U. S. 675, which has no application whatever to the instant proceeding. The statute there involved was the Labor Management Relations Act, 1947, (the Taft-Hartley Act), 61 Stat. 136, 29 U. S. C. (Supp. III) 141, *et seq.*,

BLEED THROUGH– POOR COPY

Section 10(a) of which empowers the National Labor Relations Board to prevent unfair labor practices "affecting commerce." Section 2(6) defines commerce as "trade, traffic, commerce, transportation or communication among the several States * * *." Section 2(7) defines the term "affecting commerce" to mean "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." It is clear, therefore, that the Taft-Hartley Act is concerned with impediments to transportation between the states, and not, like the Sherman Act, with market restraints on interstate commerce. *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, established this important distinction.

At the time of the Apex strike 130,000 dozen pairs of finished hose, valued at $800,000.00, were on hand ready for shipment, chiefly to other states, on unfilled prior orders. During the strike the defendants refused to permit any shipments from this stock. There was no doubt that the defendants intended to, and actually did, restrain the interstate flow of hosiery. Nevertheless, the Court held that the defendants were not liable under the Sherman Act merely because they obstructed shipments among the several states. The Court concluded that the strikers' activities, although obstructing transportation, did not exert on the interstate market there involved the type of restraint at which the Sherman Act is aimed.

In the *Denver Building Council* case, there was a finding of fact (pp. 683-684) that "any widespread application of the practices here charged might well result in substantially decreasing the influx of materials into Colorado from outside the State * * *." Jurisdiction under the Taft-Hartley Act concept of "affecting commerce" was clear. But

BLURRED COPY

the *Apex* case squarely holds that the mere fact that interstate commerce is so "affected" is insufficient to invoke the Sherman Act.

It is interesting to note that even if the complaint in the instant case were tested by the irrelevant standard of the Taft-Hartley Act, it would be insufficient for the reason that the Government has not alleged that appellees' activities substantially decrease the influx of lathing materials into Illinois.

The foregoing analysis applies with equal accuracy to *Electrical Workers* v. *National Labor Relations Board,* 341 U. S. 694, and *Carpenters Union* v. *National Labor Relations Board,* 341 U. S. 707, also relied upon by the Government.

The specter of the building industry running amuck is raised by the Government at pages 23 and 24 of its brief. Numerous cases are cited showing that the Anti-Trust Division has been hard at work enforcing the Sherman Act in this industry. We commend the Anti-Trust Division for its diligence, but we would remind it that it is the complaint in the case at bar which is in issue. In determining the validity of the instant complaint we are certain that this Court will not remedy the Government's omissions by imputing to these appellees the acts and practices of persons and organizations not parties to this lawsuit.

This Court has never found a violation of the Sherman Act in the absence of an actual or intended restraint on interstate commerce. Yet that is exactly what the Government now asks the Court to do. The Government here seeks to apply the Sherman Act to an intrastate conspiracy without alleging one fact to show that the activities of the defendants are intended to or do in fact restrain interstate commerce in any way.

BLEED THROUGH– POOR COPY

III.

A DECISION UPHOLDING THE COMPLAINT AT BAR WOULD VIRTUALLY EMASCULATE THE LIMITED CLAYTON ACT EXEMPTION REMAINING AFTER THE ALLEN BRADLEY CASE.

The effort of the Government in the case at bar is clearly recognized as an attempt further to whittle away at the exemption granted this appellee-union by Section 6 of the Clayton Act, 38 Stat. 730, 15 U. S. C. 17.[7]

In the absence of a restraint of interstate commerce of the kind banned by the Sherman Act, (See *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469), this exemption now applies regardless of whether the unions and their employers work with material which originates in the same state or with material which originates in other states. See *United States* v. *International Hod Carriers & Common Laborers' District Council, et al.*, 313 U. S. 539, affirming *United States* v. *Carrozzo*, 37 F. Supp. 191 (N. D. Ill. E. D.).

Allen Bradley Co. v. *Local Union No. 3*, 325 U. S. 797, held that a labor union which combined with employers to raise prices and control the market for electrical equipment sold and distributed in interstate commerce thereby lost its Clayton Act exemption and hence violated the Sherman Act.

The scope of the exemption conferred by Section 6 of the Clayton Act was considerably restricted by the *Allen*

---

[7] Section 6 of the Clayton Act provides:

"The labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purpose of mutual help, and not having capital stock, or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws."

BLURRED COPY

Bradley case. After the decision in that case, the Anti-Trust Division could successfully prosecute a labor union under the Sherman Act by alleging (a) that the labor union has combined with an employer and (b) that this combination exerted on interstate commerce the kind of restraints banned by the Sherman Act. The Government seeks in the instant case to do away with the requirement that a restraint of interstate commerce be shown, and to substitute for that now essential allegation a statement that the employer-union combination uses materials originating in other states and the conclusion that anything which disturbs the performance of the work "necessarily and directly" restrains the interstate flow of the materials involved.

The instant case, unlike the *Allen Bradley* case, is not alleged to involve the imposition of a restraint on an interstate market. It involves only a union-employer agreement limited in purpose and scope to intrastate services and to the conditions under which the union members are willing to work for the employers. To hold that this agreement is a conspiracy in restraint of interstate commerce merely because those who are parties to it use material from other states, not belonging to either of them, would be virtually to emasculate the limited Clayton Act exemption remaining after the *Allen Bradley* case. Such a decision would seemingly subject every collective bargaining agreement in the building trades industry to review by the Anti-Trust Division, since practically every building trades union handles materials originating in interstate commerce.

To make the availability of the Clayton Act exemption to this appellee dependent solely on whether the local union-employer combination uses materials originating in other states is tantamount to holding that local building trades-

BLEED THROUGH– POOR COPY

men and local building trades unions are themselves engaged in and a part of interstate commerce.

Despite the realities of the facts in the case at bar and despite the authority to the contrary, the Government has stretched painfully to bring the concept of interstate commerce into this case. Common sense cries out against this attempt to distort the intent of Congress and to circumvent the constitutional limitations on the federal jurisdiction. *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 495; *Atlantic Cleaners & Dyers* v. *United States,* 286 U. S. 427, 434.

The conduct alleged in the instant complaint is purely local, and the alleged combination is stamped only with an intrastate character. Whether or not *any* disruption in the performance of lathing work in the Chicago area "necessarily and directly" restrains the interstate flow of lathing materials, the local conspiracy alleged is far beyond the intent of the Sherman Act. As Justice Cardozo said in his concurring opinion in *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, at 554:

> "• • • There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. • • • Activities local in their immediacy do not become interstate and national because of distant repercussions. • • • To find immediacy or directness here is to find it almost everywhere. If centripetal forces are to be isolated to the exclusion of the forces that oppose and counteract them, there will be an end to our federal system."

The majority opinion of the Court stated the same proposition in the following language, at page 548 of 295 U. S.:

> "• • • the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system.

BLURRED COPY

Otherwise, as we have said, there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government."

Conclusion.

For the foregoing reasons, the judgment of the district court dismissing the complaint should be affirmed.

Respectfully submitted,

LESTER ASHER,

NATHAN M. COHEN,

ROBERT S. FIFFER,

Attorneys for Local No. 74 of Wood, Wire and Metal Lathers International Union of Chicago, Illinois and Vicinity.

Appellee.

BLEED THROUGH– POOR COPY

Office - Supreme Court, U. S.
FILED
JAN 27 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 439

UNITED STATES OF AMERICA,

Appellant,

vs.

EMPLOYING LATHERS ASSOCIATION OF CHICAGO AND VICINITY, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLEES EMPLOYING LATHERS ASSOCIATION OF CHICAGO AND VICINITY, HARRY D. FOLLETT AND EDWARD D. CHOUINARD.

LEO F. TIERNEY,
HOLLAND F. FLAHAVHAN,
CHARLES L. STEWART, JR.,
Attorneys for Appellees Employing Lathers Association of Chicago and Vicinity, Harry D. Follett and Edward D. Chouinard.

Of Counsel:
MAYER, MEYER, AUSTRIAN & PLATT.

BLEED THROUGH- POOR COPY

INDEX.

	PAGE
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Summary of Argument	7

ARGUMENT.

A. The Complaint Failed to Allege a Restraint Upon Interstate or Intrastate Commerce in Lathing Materials or in Other Building Materials	9
B. It Is Immaterial How Long the Lathing Materials Remain "In Interstate Commerce," Since the Allegations Show That Appellees Had No Control Over Trade in Lathing Materials in the Chicago Area	22
C. No Unreasonable Restraint Was Alleged	26
D. No "Monopolization" of Any Part of Interstate Commerce Was Alleged	28
E. The Complaint Violated Important Requirements of the Federal Rules of Civil Procedure	29
Conclusion	30

BLURRED COPY

CITATIONS.

Cases.

Apex Hosiery Co. v. Leader, 310 U. S. 469 ..... 17, 26
Carpenters Union v. National Labor Relations Board, 341 U. S. 707 18
Hopkins v. United States, 171 U. S. 578 26
Industrial Association v. United States, 268 U. S. 64 ... 7, 21
International Brotherhood of Electrical Workers v. National Labor Relations Board, 341 U. S. 694 18
Levering & Garrigues Co. v. Morrin, 289 U. S. 103 ..... 7, 22
Local 167 v. United States, 291 U. S. 293 ..... 7, 15, 16
Lorain Journal Co. v. United States, 342 U. S. 143 ... . 7, 16, 20
Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U. S. 219 ..... 16, 19, 20, 21
National Labor Relations Board v. Denver Bldg. & Const. Trades Council, 341 U. S. 675 ..... 7, 8, 15, 17, 18
Polish National Alliance v. National Labor Relations Board, 322 U.S. 643 18
Ruddy Brook Clothes, Inc. v. British and Foreign Marine Ins. Co., 195 F. 2d 86 (7 Cir., 1952), cert. denied, 344 U. S. 816 28
Schechter Poultry Corp. v. United States, 295 U. S. 495 28
Standard Oil Co. v. Federal Trade Commission, 340 U. S. 231 ..... 8-9, 18, 24, 25
Standard Oil Co. v. United States, 221 U. S. 1 18
United States v. Chrysler Corp. Parts Wholesalers, 180 F. 2d 557 (C. A. 9) 21-22
United States v. Oregon State Medical Society, 343 U. S. 326 ..... 7, 15, 21, 27-28

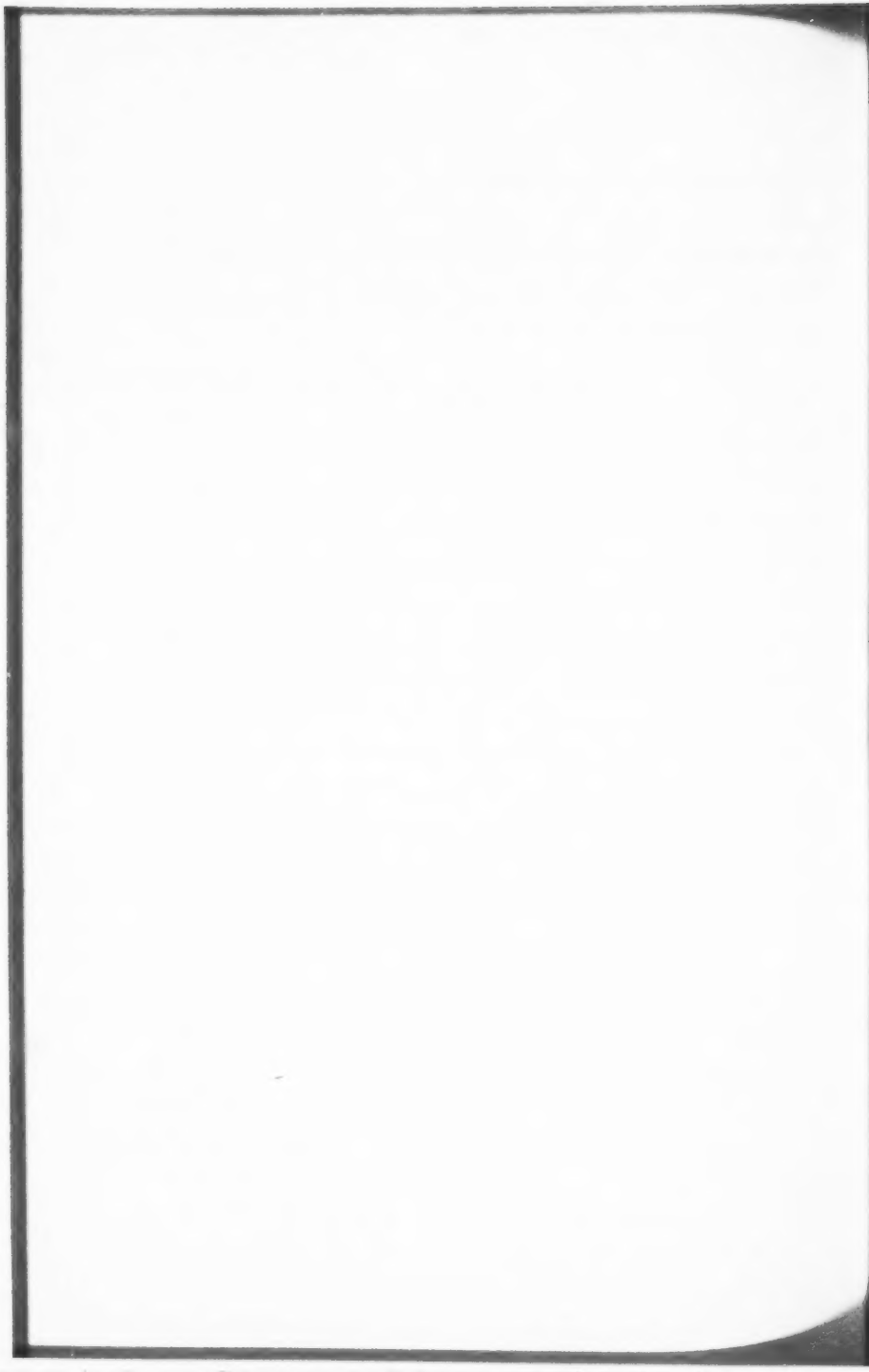
BLEED THROUGH– POOR COPY

United States v. Womens Sportswear Ass'n., 336 U. S. 460.....16, 18-19
United States v. Yellow Cab Co., 332 U. S. 218...7, 8, 21, 26
Walling v. Jacksonville Paper Co., 317 U. S. 564....8, 24, 25
Wickard v. Filburne, 317 U. S. 111..... 21

Statutes and Rules.

Expediting Act, Section 2..... 1
Fair Labor Standards Act..... 25
National Labor Relations Act.....8, 17, 18
Robinson-Patman Act.....18, 25
Sherman Act, Section 1.....2, 8, 17, 18, 21, 22, 25, 26, 29
Sherman Act, Section 2.....26, 28
Sherman Act, Section 4.....1, 22
Clayton Act.....17, 18
Rule 8, F. R. C. P.....21, 29

BLURRED COPY



BLEED THROUGH- POOR COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 439.

UNITED STATES OF AMERICA,
Appellant,

vs.

EMPLOYING LATHERS ASSOCIATION OF CHICAGO AND VICINITY, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLEES EMPLOYING LATHERS ASSOCIATION OF CHICAGO AND VICINITY, HARRY D. FOLLETT AND EDWARD D. CHOUINARD.

OPINION BELOW.

The opinion of the District Court (R. 21) is not yet reported.

JURISDICTION.

This Court has jurisdiction under Section 2 of the Expediting Act[1] to determine whether the District Court had jurisdiction under Section 4 of the Sherman Act[2] to pre-

1. Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869.

2. Act of July 2, 1890, 26 Stat. 209, as amended by the Act of March 3, 1911, 36 Stat. 1167, 15 U. S. C. 4.

BLURRED COPY

vent and restrain the local activities alleged in the complaint.

QUESTION PRESENTED.

We consider appellant's statement of the Question Presented (Br. 2) misleading and unfair, as we explain in part A of the Argument in this Brief, and believe the following to be a forthright statement of the critical issue on this appeal:

The complaint alleges an agreement between a local union and a local employers' organization to "suppress competition" in the employers' completely intrastate services. The parties to the agreement work with, but never own, materials originating in other States. The parties use the materials in constructing improvements on Illinois real estate. The complaint does not allege that anything the parties have done was intended to or did in fact restrain the alleged interstate flow of materials into the local area.

The question presented is whether the complaint states a claim against the union and the employers' organization for which relief can be granted under Section 1 of the Sherman Act, solely because some of the materials used by the parties originate in other states.

STATUTES INVOLVED.

The Act of July 2, 1890, 26 Stat. 209, known as the Sherman Act, as amended, provides in part as follows:

> Section 1 [as amended by the Act of August 17, 1937, 50 Stat. 693]. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *. [15 U. S. C. 1.]
>
> * * * * *

BLEED THROUGH– POOR COPY

Sec. 4 [as amended by the Act of March 3, 1911, 36 Stat. 1167]. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * * [15 U. S. C. 4.]

STATEMENT.

The Statement in the Government's brief, like the complaint, is circumlocutory, metaphorical and sprinkled with legal conclusions and paraphrases of the language of the Court in other cases.

The facts alleged in the complaint are not complex and can be stated directly and concisely in simple outline, for example:

1. The Chicago area is in the three Illinois counties of Cook, DuPage and Lake.[3]

2. Building Materials:

   a. Lathing materials are used in constructing buildings in the area.[4] They include "gypsum lath, metal lath, cornerites, corner beads, channel irons and tie-wire" produced in States other than Illinois.[5]

   b. Local building material dealers purchase lathing materials from out-of-State sources.[6] Usually the building material dealer orders lathing materials for his stock,[7] because he expects to sell them (he anticipates a regular demand for them),[8] but sometimes he orders them after a

3. Par. 7. R. 3.
4. Pars. 8, 9 (R. 3); 11-14 (R. 4); 15, 16 (R. 5).
5. Par. 11, R. 4.
6. Par. 12, R. 4.
7. Pars. 12, 13 (R. 4).
8. Par. 13, R. 4.

BLURRED COPY

plastering contractor has placed an order with him.[9] Most shipments of the materials are delivered to the dealer's place of business[10] but some are delivered at the job-site or at the plastering contractor's place of business.[11] The building material dealer resells the materials to a plastering contractor.[12] The plastering contractor contracts with a building owner or a general contractor, to lath and plaster the walls and ceilings in a particular building.[13] A few plastering contractors employ, supervise and pay journeymen and apprentice lathers, members of Local 74, to help build walls and ceilings with the various lathing materials,[14] but most plastering contractors make contracts with employing lathers to take charge of these operations for them.[15]

c. Other building materials and appurtenances used in constructing buildings in the area include plumbing fixtures, heating and air conditioning outlets and vents, electrical outlets and fixtures, flooring and interior wood trim, and window and door sashes.[16]

d. A substantial part of such other items is produced in States other than Illinois, sold and shipped to the Chicago area, distributed, and added to lathed and plastered walls and ceilings.[17]

3. Defendants' functions.

a. Employing lathers are hired by contract, by the plastering contractors[18] who own the lathing materials while they remain distinct from the

9. Par. 12, R. 4.
10. Par. 12, R. 4.
11. Par. 14, R. 4.
12. Par. 12, R. 4.
13. Par. 8, R. 3.
14. Par. 23, R. 7.
15. Par. 8, R. 3.
16. Par. 16, R. 5.
17. Par. 16, R. 5.
18. Par. 8, R. 3.

BLEED THROUGH– POOR COPY

building,[19] to take charge of incorporating them into the structure. Employing lathers hire, supervise and pay journeymen and apprentice lathers in and for this work.[20]

b. Journeymen and apprentice lathers use lathing materials in building walls and ceilings.[21]

4. In 1951, new building construction and remodeling to the value of $500,000,000 was done by the building construction industry in the area.[22] $5,000,000 (1% of the total) was paid under lathing contracts to the members of the defendant Association.[23]

6. The conspiracy.

a. The co-conspirators were:[24]

(1) The Association,[25] which consisted of 16[26] of the 36[27] employing lathers in the area, who in 1951 received 5/8 of the money paid in the area pursuant to lathing contracts, for lathers' wages and employing lathers' charges.[28]

(2) Local 74 which consisted of approximately 700 journeymen lathers and apprentices who performed "practically all" of the lathing work in the area.[29]

(3) Harry D. Follett, an employing lather and president of the Association.[30]

(4) Edward D. Chouinard, an employing lather and active member of the Association.[31]

---

19. Pars. 12-14, R. 4.
20. Par. 15, R. 5; Pars. 8, 9 (R. 3); Par. 6, R. 3.
21. Par. 6, R. 3.
22. Par. 16, R. 5.
23. Par. 10, R. 4.
24. Par. 3 (R. 1-2); Par. 19, R. 6.
25. Par. 3(a), R. 1-2.
26. Par. 3(a) (R. 2).
27. Par. 9 (R. 3).
28. Pars. 9, 10 (R. 3).
29. Par. 3(b) (R. 2).
30. Par. 3(c) (R. 2).
31. Par. 3(d) (R. 2).

BLURRED COPY

(5) "Numerous" employing lathers, "including those who are members of the Association,"[32] and "others to the plaintiff unknown."[33]

b. Duration: "For many years past," to the date of the filing of the complaint.[34]

c. Terms:

(1) Local 74's approval would be necessary[35] for any person to become an employing lather permitted to employ and supervise skilled labor in lathing work; one qualification for employing lathers would be five years' prior membership in Local 74;[36] members of Local 74 would not submit to employment and supervision by any employer not first approved by Local 74;[37] and membership in Local 74 would be restricted by racial and family relationship standards.[38]

(2) Particular plastering contractors would be assigned to certain employing lathers.[39]

(3) The number of plastering contractors who employ and supervise members of Local 74 without using employing lathers would be reduced.[40]

(4) The Association and others would "effectuate payments" of money to officers of Local 74 to "induce them" to "utilize the power of that Local" in "furtherance" of the conspiracy.[41]

---

32. Par. 5 (R. 2).
33. Par. 19 (R. 6).
34. Par. 19 (R. 6).
35. Par. 20(a)(1) (R. 6).
36. Par. 20(a)(2) (R. 6).
37. Par. 20(a) (3) (R. 6).
38. Par. 20(a) (4) (R. 6).
39. Par. 20(b) (R. 6).
40. Par. 20(c) (R. 6).
41. Par. 20(d) (R. 7).

BLEED THROUGH– POOR COPY

7. The things agreed upon were done.[42]

8. There were approximately 95 employing lathers in the area in 1925 and 36 in 1952.[43] 16 of these agreed to register the "accounts" claimed by them, and not to solicit or perform lathing contracts with a plastering contractor "recognized" as the "account" of another employing lather without the other's consent.[44]

No further facts are alleged.

Crucially, no facts are alleged showing what the *conspiracy* had to do with the *building materials*.

SUMMARY OF ARGUMENT.

A. The business allegedly restrained is described in the complaint as the business of employing and supervising skilled labor in working with lathing materials. The allegations of the complaint afford no justification for the government's statement (Br. 4) that interstate commerce in building materials was to be restrained under the conspiracy. The complaint does not allege that defendants here obstructed the local distribution or use of goods arriving from other States. It therefore does not allege a restraint of interstate commerce. *United States* v. *Oregon State Medical Society*, 343 U. S. 326; *United States* v. *Yellow Cab Co.*, 332 U. S. 218; *Industrial Association* v. *United States*, 268 U. S. 64; *Levering & Garrigues Co.* v. *Morrin*, 289 U. S. 103. This case is unlike the cases cited by the Government in which parties had obstructed channels of distribution or prevented use of the goods or services in the State of destination. *Lorain Journal Co.* v. *United States*, 342 U. S. 143; *Local 167* v. *United States*, 291 U. S. 293; and especially *National Labor*

42. Pars. 21-28 (R. 7-9).
43. Par. 29(a) (R. 9).
44. Par. 28 (R. 9).

BLURRED COPY

Relations Board v. *Denver Bldg. & Constr. Trades Council*, 341 U. S. 675.

The Sherman Act is not designed to punish strikes, lockouts, arbitrary union membership rules and similar interferences with local building construction. Par. 18 of the Complaint, R. 5, alleges that "*any* restraint upon or disruption in or *interference with the performance of lathing work* in the Chicago area necessarily directly restrains and affects the interstate flow of lathing materials". This is an argument instead of an allegation, and an argument which proves so much, it proves nothing. The same argument, if accepted, would prove that any local strike or that the Denver Building and Construction Trades Council in the situation which gave rise to the case of *N. L. R. B.* v. *Denver Bldg. Council*, 341 U. S. 675, violated the Sherman Act as well as the National Labor Relations Act.[45]

The above-quoted argument is the sole statement by which the complaint attempts to show an effect of the conspiracy on interstate commerce in materials. Effects on interstate commerce are essential allegations, and not merely particulars. Lacking such allegations, a complaint "fails to state a cause of action under the Sherman Act". *United States* v. *Yellow Cab Company*, 332 U. S. at p. 233.

B. Whether building materials are still "in interstate commerce" long after they arrive at materials yards in the State of destination and have been sold to plastering contractors, as the Government here contends (Br. 17-20), is not involved. Since the instant complaint did not allege a restraint upon trade in such materials at any stage, local or interstate, the question is not properly at issue here. Moreover, the materials here involved were acquired and held by local people for local disposition, and hence beyond the limits of interstate commerce defined in *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564 and *Standard Oil*

45. 29 U. S. C. § 151, *et seq.*

BLEED THROUGH– POOR COPY

Co. v. *Federal Trade Commission*, 340 U. S. 231. This appeal is a deliberate attempt to extend the federal power over local matters without consulting Congress or the States.

C. The "restraint" allegedly contrived by these defendants was not unreasonable *per se*, nor would the facts alleged justify an inference that the conspiracy might have had unreasonable effects.

D. Argumentation and obfuscation in pleadings is contrary to the spirit of the federal rules of civil procedure and should not be resorted to by counsel representing the sovereign any more than by other counsel.

ARGUMENT.

A. The Complaint Failed to Allege a Restraint Upon Interstate or Intrastate Commerce in Lathing Materials or in Other Building Materials.

The trial judge dismissed the complaint because it failed to allege a restraint upon interstate commerce. His decision was correct, and should be affirmed.

The alleged facts show unquestionably that the employing lathers perform a local service, the hiring and supervision of skilled labor in one phase of construction work. The complaint alleges a plan to restrict that function to men with five years' experience at the work they wish to supervise, to let the union determine who may employ and supervise its members, and to assist the men performing that service in keeping their steady relationships with the plastering contractors for whom they work, free from attempts by 15 of the 35 others to disestablish and replace them. Further, membership in the union was to be open

BLURRED COPY

only to persons meeting its unspecified "arbitrary" membership restrictions.

Like many other practices in this and other industries, reasonable men may debate the social and economic wisdom of such an arrangement as this. But the anti-trust division has authority to bring its challenge before the courts, only if the intent or the effect of the arrangement is far-reaching enough to unduly burden some interstate trade and commerce over which the parties to the arrangement exert some effective influence or control.

The parties complained of in this case are in the local building industry, and some of the materials which they use in their work are products of manufacture in other States. This is the only connection between the "conspiracy" and interstate commerce. The author of the complaint took pains to allege, albeit not very directly or clearly, the course followed by such materials from their out-of-State sources to the buildings in which they are incorporated by the skilled labor of the union lathers under supervision of the employing lathers. Nowhere, however, does it appear that the agreement under attack reached out to control the trade and commerce by which the materials reached their final destination. The materials appellees work with are provided for them by the plastering contractors for whom they work. The typesetters who help to print this brief have a closer relationship to the ink and paper industries, than the appellees in this case have to the building materials industry. Moreover, while many other local services touch articles which later move forward again, into interstate commerce, walls (which these appellees make), never move again.

The lack of connection between the appellees and interstate commerce of any kind led the antitrust division to unusual efforts to allege a connection by metaphors and abstractions where none could honestly be stated as a fact.

BLEED THROUGH– POOR COPY

Thus the complaint solemnly alleged that "lathing contractors are conduits," and that lathing materials "flow" through these "conduits" in a "continuous stream". It generalized that *any* interference with the performance of lathing work necessarily burdens interstate commerce in lathing materials, in violation of the Sherman Act. It did not allege that the agreement in question interfered with the performance of lathing work. The complaint argued that the increase in the cost of building in the area, in this period of general price advances due to wars, material shortages, labor costs and supply and demand, was one of the "effects" of the conspiracy. It did not say that lathing work was made more expensive, nor that the arrangement resulted in less efficiency in the performance of lathing work.

The Government's brief consistently commits a demonstrable error in interpreting the complaint: it assigns to the employing lathers the function of buying and reselling lathing materials orginally shipped from other States, a function which the complaint correctly assigned to plastering contractors. This error in the Government's brief is vital and seriously misleading, since the sole commerce influenced by the conspiracy is alleged to have been the competition among employing lathers ("lathing contractors").

According to the complaint (par. 8, R. 3), *plastering contractors,* in their contracts with general contractors, agree "to furnish the plastering and lathing materials and to have the same installed." It is the plastering contractor who contracts "for the sale of said materials to general contractors or building owners." "* * * the plastering contractor enters into a subcontract with the lathing contractor for the installation of lathing materials in the building, said lathing materials being furnished by the plastering contractor to the lathing contractor." What the

BLURRED COPY

"lathing contractor" does (par. 15, R. 5) is "employ and supervise skilled labor for this purpose" (installing lathing materials).

Despite these explicit allegations to the contrary, the Government brief refers (p. 2) to employing lathers as "contracting to furnish and install lathing materials."

According to the complaint (pars. 8-14), *all* of the lathing materials alleged to come from other States are purchased from (or "through") local dealers by plastering contractors and resold by plastering contractors to general contractors or building owners. (The "sale" is in the form of lathed and plastered walls.) Yet the Government's brief asserts (p. 2) that the complaint "alleged that a major part of the materials which lathing contractors supply * * * is shipped into the Chicago area from outside the state." In defining "lathing contractors," the complaint says that they "customarily enter into contracts based upon the furnishing of labor and part of the lathing materials by the lathing contractor * * *" but (a) this general allegation must be disregarded because inconsistent with the numerous more particular allegations in pars. 8-14 that the plastering contractor furnishes all lathing materials, and (b) this allegation does not assert, as does the Government's brief, that any lathing materials *from other States* are furnished by "lathing contractors." Paragraphs 8-14 purport to describe what happens to lathing materials from other States, and they show that appellees do not furnish such materials, but merely use those furnished by others for their use.

Having thus assigned broader functions to employing lathers, the Government's *brief* next enlarges the scope of the conspiracy to take in these added functions. As a result of such bootstrap-lifting, the conspiracy which the *complaint* described as one to "suppress competition among the lathing contractors in the Chicago area and to restrict

BLEED THROUGH– POOR COPY

and exclude persons from engaging in the lathing contracting business in said area" is represented (Br. 4) to be one of "conspiring to restrain interstate commerce in lathing materials shipped from outside the State of Illinois."

The very term, "lathing contractor" is apt to mislead, as it has apparently misled Government counsel, when applied to employing lathers. These men do not call themselves "lathing contractors," they are known as employing lathers and they call their association the Employing Lathers Association. They are men capable of employing skilled workmen and supervising lathing work, but the complaint clearly shows that they are not also in the business of buying and selling goods, as is commonly true of contractors in the building industry. In this brief, therefore, we refer to the employing lathers as employing lathers, rather than as "lathing contractors."

Analysis of the complaint in this case quickly reveals what was done in attempting to forge the all-important link between the alleged conspiracy, and interstate commerce. A type of "all-for-the-want-of-a-horse-shoe-nail" logic is used. Succinctly put, if the lathers would not install it, a lath would not be needed, and if it were not needed, it would not be shipped to Chicago in interstate commerce.

However, the complaint does not allege that as a result of the conspiracy, the lathers refused to install lath, or installed less lath, or that less lath was needed, or less lath was shipped to Chicago in interstate commerce. It does not allege that any building was prevented from being completed, or any builder was restrained from building; or any person in the Chicago area or elsewhere was injured in any way. For aught that appears, the volume of lathing work done in the area may have greatly expanded, the quality and safety of ceilings and walls built in the area may have been greatly enhanced, and the de-

BLURRED COPY

mand for lathing work and the consumption of lathing materials may have greatly increased, as a result of appellees' conduct.

The complaint merely alleges:

> (Par. 15, R. 5). "* * * The service performed by lathing contractors * * * is an integral part of, and necessary to, the movement in interstate commerce in lathing materials * * *. * * * The function performed by said lathing contractors * * * is essential to the interstate flow of said materials, since said lathing materials are of no use to the ultimate purchaser until they are installed in buildings. * * *"
>
> (Par. 16, R. 5). "The lathing operation is an integral part of the building construction industry * * * and the performance of said lathing operation is necessary to the completion of other building operations, including * * * the installation of plumbing fixtures [etc.] * * *"
>
> (Par. 17, R. 5). "The installation or use in buildings of said building materials and appurtenances [plumbing fixtures, etc.] is an integral part of, and necessary to, the movement in interstate commerce of said materials * * *."
>
> (Par. 18, R. 5). "Any restraint upon or disruption in or interference with the performance of lathing work in the Chicago area necessarily and directly restrains and affects the interstate flow of lathing materials, and also constitutes a direct and substantial burden and restraint upon the interstate flow of all of the hereinbefore referred to building materials and appurtenances entering into the construction of buildings in the Chicago area."

Here the allegations concerning effects on interstate commerce stop. The rest of the complaint deals with an alleged agreement as to who shall supervise the 700 union members while they build walls and ceilings with lathing materials. There is no agreement as to how fast or how long they shall work, no agreement as to how much they

BLEED THROUGH– POOR COPY

shall be paid, no agreement as to what type of lathing material they shall install, and no interference with the performance of lathing work. There is no attempt to fix the price of lathing material, no attempt to control the quality or quantity of lathing material, and no attempt to determine who shall buy and who shall sell the material. The subject matter of the "conspiracy" is whether the lathers shall be supervised by former lathers approved by their union, and the agreement is that they shall. If this agreement has somehow burdened interstate commerce in building materal, the complaint has kept the secret well. The other subject dealt with by the "conspiracy" is whether 16 of the 36 employing lathers shall compete for each other's accounts, and the agreement is that they usually will not. That such an agreement does not necessarily interfere with the purchase and sale of materials from other States was established in *United States* v. *Oregon State Medical Society,* 343 U. S. 326, and the complaint does not allege anything to show such an effect in this case.

To be sure, commerce among the States may be, and frequently is, burdened by practices in the State of final sale of goods which move interstate. *Local 167* v. *United States,* 291 U. S. 293, 297; *National Labor Relations Board* v. *Denver Bldg. Council,* 341 U. S. 675. The trial judge in this case recognized this when he said (Tr. 31, R. 16-17):

> "There is no allegation of any effect of that intrastate conspiracy upon the interstate market price of the building material involved. I might add, so far as I can see there is no allegation of any discrimination or anything that would cause a man to buy his building material in Wisconsin or in Chicago or in California, no restraint that I can find in the allegation. There is no allegation of fact of its effect upon the flow of materials into the State of Illinois. * * *"

BLURRED COPY

Government counsel speak (Br. 14, 15) of the trial court's "apparent assumption that obstructions to and restraints upon interstate commerce can occur only at the beginning, or in the course of, an interstate movement of goods." The court made no such assumption. It *first* considered whether there was a restraint of the trade in materials before they were used by appellees in Illinois, in the passage quoted above, and finding none alleged, turned then to discuss, in the paragraph attacked at p. 15 of the Government's brief, the other possibility that there might be a restraint upon goods moving out into interstate commerce.

Unwittingly, the Government commends the logic of this approach by adopting the same organization in its brief. Thus at pp. 15-20, it discusses "state of destination" restraints such as were found in the *Local 167* and *Lorain Journal* cases, and later at pp. 21-22, it discusses "state of origin" cases such as *Mandeville* and *Sportswear*.

In *Local 167* v. *United States*, 291 U. S. 293, the defendants included poultry slaughterers and wholesalers and two service unions (teamsters and slaughterers). The metropolitan area was interstate, including parts of New York and New Jersey. Pursuant to the conspiracy, teamsters refused to haul poultry from the two terminals (in Manhattan and Jersey City) to recalcitrant marketmen, and slaughterers refused to slaughter for them. There was interference with "the unloading, the transportation, the sales by marketmen to retailers, the prices charged and the amount of profits exacted." (291 U. S. 297.)

Neither the sales and prices of lathing materials in the Chicago area, nor the shipment and movement of such materials into the area was alleged to be affected in the instant case. If there had been interference of that kind, the complaint would have said so. The Government has had many years' experience in alleging restraints on interstate commerce.

BLEED THROUGH– POOR COPY

There was nothing alleged in the complaint to show that defendants sought to prevent anyone in their home State from using building materials from other States, as was true in *National Labor Relations Board* v. *Denver Bldg. Council*, 341 U. S. 675, cited at pp. 12 and 15-16 of the Government's brief. In that case the strike sought to require a Denver general contractor to cease doing business with a Denver electrical contractor which purchased in other states 65% of the materials it sold in Colorado, and which also shipped $5,000 of its products to other states. In the instant case there is no stoppage or interference with the purchases or sales of the building material dealers who buy materials in other states or of the plastering contractors who buy materials from them in the Chicago area and use them locally.

Moreover, the National Labor Relations Act was designed to reach not all obstructions of interstate commerce but practices of certain specific types described by Congress, if found by the N. L. R. B. in particular cases to be practices "tending to lead to" burdens upon or obstructions of interstate commerce. It may thus be compared to the Clayton Act[46] with its prohibitions of certain practices when the Federal Trade Commission finds in a particular case that they tend to lessen competition in interstate commerce. These statutes contrast sharply with the Sherman Act, which in very general terms prohibits all threatened or actual restraints of interstate commerce. To interpret and apply the Sherman Act as the Government here suggests would overrule *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, and similar cases, and hold every local strike to be a conspiracy to restrain interstate commerce, and hence a Sherman Act violation and would render both the National Labor Relations Act and the Clayton Act obsolete. Government counsel here have suggested (Br. 23) that the Sherman Act should be applied wherever there is "a

46. 15 U. S. C. § 12, 14 *et seq.*

BLURRED COPY

pattern of restraint 'which if left unchecked may well become far-reaching in its harm to commerce.'" It was because the Sherman Act did not prohibit restraints in their incipiency that the Clayton Act and the Robinson-Patman Act[47] were enacted.

The four N. L. R. B. cases cited in the Government's brief[48] are all cases under the National Labor Relations Act in which the Board and the Court held that the practices complained of were of the specific types which Congress had prohibited in the Act, and occurred in circumstances which brought them within the Board's jurisdiction. They were not cases where the executive branch decided that the defendants' local acts, if often repeated in other localities, might constitute a pattern in restraint of interstate trade. Similarly, *Standard Oil Co.* v. *Federal Trade Commission*, 340 U. S. 231, cited at p. 20 of the Government's brief, involved an administrative hearing and determination that the price discrimination there involved *tended* to lessen competition in interstate commerce in the manner prohibited by the Statute. None of these were claims under the Sherman Act for anything so broad as "restraint of trade". To follow them in Sherman Act cases would destroy the rule of reason and so broaden the Act as to destroy its constitutionality. *Standard Oil Co.* v. *United States*, 221 U. S. 1, 63.

In the Sherman Act cases cited by the Government there were direct and substantial burdens upon interstate trade. In *United States* v. *Women's Sportswear Mfr's. Assn.*, 336 U. S. 460 (1949), the Court stated (p. 461), "We first should be satisfied that the activities on which restraints

47. 15 U. S. C. §§ 13, 13a, 13b, 13c.

48. *National Labor Relations Board* v. *Denver Bldg. Council*, 341 U. S. 675 (Br. 12, 15-16); *Electrical Workers* v. *National Labor Relations Board*, 341 U. S. 694 (Br. 16); *Carpenters Union* v. *National Labor Relations Board*, 341 U. S. 707 (Br. 16) and *Polish National Alliance* v. *National Labor Relations Board*, 322 U. S. 643 (Br. 23).

BLEED THROUGH– POOR COPY

are alleged to have been exerted constitute commerce among states," and noted (p. 462), "at least 80% of the finished sportswear is sold and shipped to customers outside of that state." The Court stated the rule at p. 464 as follows:

> "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."

The "squeeze" in the *Sportswear* case was applied to garments which were to be shipped from Massachusetts to many other States.

Mandeville Island Farms, Inc. v. *American Crystal Sugar Co.*, 334 U. S. 219 (1948), is another case which turned on the issue whether the acts complained of had substantial effects upon interstate commerce. The Court there also stated (p. 234) the requirement of "a *showing of actual or threatened effect upon interstate commerce.*"

The complaint in the *Mandeville* case, unlike the present complaint and indictment, was replete with specific allegations showing the effect of the acts complained of upon interstate commerce.[49] In holding that the *Mandeville* com-

49. The Court summarized the allegations with respect to the effect of the price-fixing agreement upon interstate commerce, including allegations (pp. 225-226): "* * * that *each refiner no longer competed against the others as to the price to be paid the growers, but paid the same price* on the agreed uniform basis of average net returns" and "* * * that prior to 1939 the northern California refiners had 'competed in interstate commerce with each other as to the *performance, ability and efficiency of their manufacturing, sales and executive departments, and each strove to increase sales returns and decrease expenses,*' * * *"

Further allegations were:

"However, for the seasons 1939, 1940 and 1941, *under the new uniform contracts and prices, 'there was no longer any such competition* * * *.*' Instead it was alleged upon information and belief that, *as a result of the alleged conspiracy, respondent did not conduct its interstate operations as carefully and efficiently as previously or 'as it would have had said conspiracy not existed.'* In consequence, respondent received less in sales returns for raw sugar and incurred greater expenses than if competition had been free,

BLURRED COPY

plaint stated a cause of action under the Sherman Act, the Court referred to the "specific allegations which we have set forth" (334 U. S. at page 237); and observed (p. 246):

> "The allegations are comprehensive and, for the greater part, specific concerning both the restraints and their effects."

No such statement could be made of the allegations of the instant complaint.

The interstate commerce affected in *Lorain Journal Co.* v. *United States*, 342 U. S. 143 (1951), was "a continuous flow of copy, payments and materials moving across state lines" (342 U. S. at p. 148) which was diverted from radio station WEOL to the Lorain Journal; broadcasts of "advertisements of goods and services on behalf of suppliers outside of Ohio" which resulted in interstate orders and shipments; and WEOL's broadcasts "heard with some regularity by many people in southeastern Michigan." (See note 5, p. 148.) By eliminating station WEOL, defendant would not only have burdened all of that commerce; it would have destroyed it altogether. The effect on the interstate commerce in the *Lorain Journal* case was direct, substantial and devastating.

There has been no change in the elementary principle that a restraint or monopoly substantially affecting only a

---

and *petitioners 'did not receive the reasonable value of their sugar beets.'*

"* * * *instead of the refiners 'producing and selling raw sugar in interstate commerce * * * in competition with each other * * * they became illegally associated in a common plan wherein they pooled their receipts and expenses and frustrated the free enterprise system * * *'*; all incentive to efficiency, economy and individual enterprise disappeared; and the refiners operated, 'insofar as the growers were concerned,' *as if they were one corporation owning and controlling all factories in the area*, but with three completely separated overheads and with none of the efficiency that consolidation into one corporation might bring." (Emphasis supplied)

BLEED THROUGH– POOR COPY

local business does not violate the Sherman Act. This legal proposition, which plaintiff has sought to gloss over as "now deemed not illuminating" (Br. 31) is recognized and applied in all of the recent cases relied upon by plaintiff, and *Industrial Association* v. *United States*, 268 U. S. 64, was cited and relied upon by this Court in *United States* v. *Oregon State Medical Society*, 343 U. S. 326, in 1952, long after the decision of *Wickard* v. *Filburne*, 317 U. S. 111.

Plaintiff's citation of cases where local restraints fixed prices, reduced sales, or threatened completely to destroy all movement, of goods and services in interstate commerce, serves only to emphasize the truth that in this case, plaintiff pleaded no facts showing any such burden on the alleged continuous, uninterrupted flow of building materials into Illinois buildings.

Appellant suggests (Br. 22) that the requisite effect on interstate commerce need not be alleged in this enlightened day, but may be developed at the trial, or defendants might seek a more definite statement. However, the Federal Rules of Civil Procedure require that a complaint allege facts "showing that the pleader is entitled to relief" (Rule 8 (a) (2)), and this Court has held that a complaint fails to state a cause of action if it merely alleges a restraint upon a local service without facts as to effects on interstate commerce. *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 233. The *Mandeville* case, as we have shown, stands for the same proposition by stressing the "comprehensive and specific" allegations of interstate effects which saved the complaint. *United States* v. *Chrysler Corp. Parts Wholesalers*, 180 F. 2d 557 (C. A. 9), cited in note 8 at p. 18 of the government's brief, held an allegation of "continuous

BLURRED COPY

flow" to be a statement of ultimate fact only when *"taken with other allegations"*.[50] But no case is cited by the Government, and none is known to us, where the mere fact that the defendants used items from other States in their work was held as a matter of law to establish that an agreement as to their local services necessarily burdened trade in the items used.

Far from being a mere matter of detail, allegations showing the effect of an alleged conspiracy to have regulated and restrained interstate commerce unduly were held to be jurisdictional in *Levering and Garrigues* v. *Morrin*, 289 U. S. 103 (1933). Appellant's failure to allege that essential jurisdictional fact was a defect which went to the heart of the district court's jurisdiction under Section 4 of the Sherman Act.

To uphold the instant complaint would be to abolish the most basic element in the Sherman Act—unless interstate commerce is unreasonably restrained, there is no violation of the Act.

B. It Is Immaterial How Long the Lathing Materials Remain "In Interstate Commerce", Since the Allegations Show That Appellees Had No Control Over Trade in Lathing Materials in the Chicago Area.

Appellant labors at length (Br. 17-20), to persuade the Court that lathing materials are still flowing in a continuous stream of interstate commerce while they are piled up

50. The specific allegations included the facts that defendants "purchase the parts outright and resell them as their own property", (180 F. 2d at p. 558) and had agreed "to raise and fix wholesale prices on parts * * *, to decrease and fix wholesale discounts on parts * * * and to compel authorized dealers to adhere to the prices and discounts so fixed", with the effect of eliminating all price competition in the sale of all Chrysler parts and engines which reached the area of the restraint.

BLEED THROUGH– POOR COPY

in lumber yards, transferred from train to truck, or waiting at the job-site and being used by union lathers in constructing walls and ceilings. Appellant does not, however, show that defendants have *done or agreed to do anything* to slow down the movement of the goods involved. There is not even any charge as to what portion of the lathing materials in the area are installed by appellees, or what portion are in any other way related to the charges of restraint and monopoly.

To be sure, the complaint and indictment allege figures as to the dollar volume of lathing contracts, but those figures relate to wages and contracting charges, and not to costs of materials. The appellees are not alleged to be in the business of buying and selling materials. They are not a part of the trade in materials. Appellees merely work with someone else's materials. They have no effect on the supply, the price or the quality of such materials.

We know of no other case in which the government has ever complained of anyone having so little to do with interstate commerce in goods or services as the employing lathers have to do with the materials involved in this case.

Since appellees' service is purely local and has no effect upon trade in the materials, the Court needs not decide whether laths are still in interstate commerce when the union lathers begin to use them in the construction of walls. Appellant's theory of continuous flow is certainly novel, when applied to goods as far removed from the out-of-state suppliers who ship them into Illinois, and appellant cites no case involving comparable facts. But what is even more important is that appellees have no ownership, or control over the price, supply or quality, of the materials. Appellees are not charged with attempting to gain such ownership or control, and certainly are not alleged to have conspired to restrain trade in the local business of buying

BLURRED COPY

and selling lathing materials as they allegedly "flow" from lumber yards to plastering contractors to lathing contractors to job-sites and right into the structure of homes and other buildings.

As authority for the requested holding that lathing materials remain in interstate commerce after being purchased by and delivered to plastering contractors, the Government relies (Br. 18-20) on *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, and *Standard Oil Co.* v. *Federal Trade Commission*, 340 U. S. 231. In the *Jacksonville Paper* case goods ordered in advance by specific customers, purchased by respondent from out-of-State mills, unloaded for checking at the warehouse and then sent out as quickly as possible were held still to be in interstate commerce despite this temporary pause. The Court further held that items which had been printed at the out-of-State mill with the name of the customer, and certain goods obtained by respondent to meet the particular needs of specified customers, were also in interstate commerce whether or not procured in response to prior orders, because (p. 569), "The contract or understanding pursuant to which goods are ordered, like a special order, indicates where it was intended that the interstate movement should terminate." However, as to goods ordered by the wholesaler for its stock, in anticipation of the needs of regular customers, the Court held that unless there was a "practical continuity in transit" until delivered to the wholesaler's customer, the goods in question were not still in interstate commerce, because they were no "different from goods acquired and held by a local merchant for local disposition."

Under the allegations in this case, therefore, lathing materials ordered for stock by dealers were "acquired and held by a local merchant for local disposition", and all other shipments ceased to be in interstate commerce

BLEED THROUGH– POOR COPY

when delivered to the plastering contractor, where the parties "intended that the interstate movement should terminate."

In *Federal Trade Commission* v. *Standard Oil Co.*, 340 U. S. 231, gasoline was in interstate commerce when sold in Detroit by the same company which had refined it in Indiana, transported it in tankers across Lake Michigan, and stored it in tanks awaiting sale. By contrast, the lathing materials described here were sold to the building material dealer by the party which shipped them into Illinois. Thus, the *Standard Oil* case lends even less support than the *Jacksonville* case to the theory that lathing materials owned by plastering contractors remain in interstate commerce while being incorporated by appellees into parcels of real estate in Illinois.

It is significant that both of the cases relied upon by the Government involved statutes which apply to individual shipments and sales still in interstate commerce when they reach local markets, while the Sherman Act prohibits restraint of interstate markets only. The Fair Labor Standards Act and the Robinson-Patman Act prohibit specific types of conduct within a State so long as the goods remain in the practical continuity of interstate transit, because Congress has found that such intrastate conduct tends to burden interstate commerce. In cases under these statutes, whether the goods involved are *in* interstate commerce when the violation of the statute occurs is crucial, while in Sherman Act cases the only relevant concern is whether an interstate market feels the pinch, whether or not the squeeze is applied while the goods are in intrastate commerce.

BLURRED COPY

C. No Unreasonable Restraint Was Alleged.

The agreement described in the complaint permits Local 74 to approve or disapprove persons wishing to employ, undertake to pay, and supervise, members of Local 74. Under it the union limits its approval to persons having five years' experience as union members doing the kind of work they wish to supervise. It also restricts each of 16 particular employing lathers from soliciting the plastering contractors with whom the other 15 already have working relationships. At least since *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, it has been recognized that "the restraints, actual or intended, prohibited by the Sherman Act are only those which are so substantial as to affect market prices" (310 U. S. at p. 500). While restraints which "control the market to the detriment of purchasers or consumers of goods and services" (310 U. S. at p. 493), do not necessarily take the form of price-fixing or restrictions on production, they are limited to restraints which are substantial enough to affect market prices.

There is no allegation from which it can be inferred that the agreement alleged in the instant complaint was substantial enough to affect market prices.

The market involved cannot be the local market for the services of employing lathers and the labor of union lathers. A local service is not interstate commerce. *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 233, *Hopkins* v. *United States*, 171 U. S. 578, 603. Government counsel have already abandoned hope of persuading this Court to uphold the contention that the defendants' labor and services are a part of interstate commerce within Section 2 of the Act, and now "deem the validity of the latter charge a matter which need not be pressed and which this Court need not reach." (Br. 4, footnote 2.) The contention that

BLEED THROUGH– POOR COPY

defendants' restraint of the local market for their labor and supervisory service violates Section 1 of the Act assumes that such services and skills are interstate commerce, and is as absurd as the monopolization charge.

However, this contention is not yet abandoned, so we are obliged to consider whether the market for appellees' services and labor in the Chicago area has been unreasonably restrained. One must search the complaint in vain for an indication that the charges made in employing lathers' contracts with plastering contractors, or plastering contractors' charges to builders for lathing and plastering, were affected in the slightest degree as a result of the "conspiracy". There is nothing in the nature of price-fixing, reduction in volume of contracts entered into or performed, or change in the caliber of the supervision of journeymen and apprentice lathers by either employing lathers or plastering contractors. In fact, paragraphs 13-15 and 17 of the complaint allege and reallege that lathing materials flow in substantial quantities without interruption from other States until incorporated into Illinois real estate by the skilled labor of the lathers under the supervision of the employing lathers.

With only 16 of the 36 employing lathers alleged to participate in the "assignment" plan, it appears that even a plastering contractor "assigned" to one of these 16 may receive bids from 21 employing lathers approved by Local 74, including the one "claiming" the plastering contractor as his account. The alleged assignment of some of the plastering contractors to particular employing lathers does not involve *any* restriction as to the territories in which the respective suppliers of service will operate, as did the plan in *United States* v. *Oregon State Medical Society*, 343 U. S. 326, yet the Court there held (p. 337),

"This is not a situation where suppliers of com-

BLURRED COPY

> mercial commodities divide territories and make reciprocal agreements to exploit only the allotted market, thereby depriving allocated communities of competition."

A fortiori, neither is this.

Paragraph 29 of the complaint which purports to describe "effects" of the conspiracy consists only of the pleader's unsupported conclusions as to remote effects which are far more likely to have resulted from general economic conditions than from the agreement charged to the defendants, and no facts are alleged which show any connection whatever between those "effects" and defendants' acts.

Like the situation in *Ruddy Brook Clothes Inc.* v. *British and Foreign Marine Ins. Co.,* 195 F. 2d 86, 90 (7 Cir. 1952), cert. denied, 344 U. S. 816, the acts and agreements here alleged are "as impotent in its relation to either commerce or competition as a lighted match to the temperature of all outdoors." As Mr. Justice Cardozo once wrote (concurring opinion in *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, 554):

> "Activities local in their immediacy do not become interstate and national because of distant repercussions. * * * To find immediacy or directness here is to find it almost everywhere."

D. No "Monopolization" of Any Part of Interstate Commerce Was Alleged.

It is evident that defendants, who never own them, could not monopolize trade in lathing materials, so the only thing they could monopolize would be their own labor and supervisory service. The Government's brief, therefore, abandons the charge in the complaint that defendants have monopolized a part of interstate commerce in violation of Section 2 of the Sherman Act.

BLEED THROUGH– POOR COPY

E. The Complaint Violated Important Requirements of the Federal Rules of Civil Procedure.

The Government's complaint in this case departed so far from the standards for pleadings announced in the Federal Rules of Civil Procedure as to call for special mention in this brief.

Rule 8, F.R.C.P. provides:

> "(a) *Claims for Relief.* A pleading which sets forth a claim for relief * * * shall contain * * * (2) a short and *plain statement* of the claim showing that the pleader is entitled to relief, * * *.
>
> "(e) *Pleading to Be Concise and Direct; Consistency.*
>
> (1) Each averment of a pleading shall be simple, concise, and direct. * * *."

The 73 lines of allegations in paragraphs 11-15 of the complaint must be read and re-read, to learn from them the simple facts that (1) out-of-state suppliers sell lathing materials to Chicago area dealers, delivering some to the dealers' places of business, some to the plastering contractors' places of business, and some to construction job-sites; (2) Chicago area dealers order some lathing materials for their stocks and some in response to prior orders from plastering contractors; and (3) the plastering contractors own the lathing materials after they buy them, until the lathers build them into walls and ceilings.

We submit that such a plain, simple, concise and direct statement of facts was called for by Rule 8, F. R. C. P. We are convinced that the facts were shrouded in conclusions and interpretations for the purpose of persuading the district judge that appellees were engaged in buying and selling lathing materials, or at least leaving that question open until the trial, and that the ulterior purpose was to apply the Sherman Act to a local situation where it does not

BLURRED COPY

reach, not in open defiance of the established precedents, but under cover of the obscurity and indirectness of the sentences used in the complaint.

By affirming the district court's judgment dismissing this complaint, the Court may remind the anti-trust division that "plain", "simple", "concise" and "direct" are words which have the same meaning and significance for Government attorneys as for all other members of the bar.

Conclusion.

For the reasons stated herein, the complaint did not show that appellant was entitled to relief against appellees, and the judgment below dismissing the complaint should be affirmed.

Respectfully submitted,

LEO F. TIERNEY,
HOLLAND F. FLAHAVHAN,
CHARLES L. STEWART, JR.,
Attorneys for Defendants, Employing Lathers Association of Chicago and Vicinity, Harry D. Follett and Edward D. Chouinard.

Of Counsel:
MAYER, MEYER, AUSTRIAN & PLATT.

BLEED THROUGH– POOR COPY

SUPREME COURT OF THE UNITED STATES

No. 439.—October Term, 1953.

United States of America, Appellant, *v.* Employing Lathers Association of Chicago and Vicinity; Local No. 74 of Wood, Wire and Metal Lathers International Union of Chicago, etc., et al.	On Appeal From the United States District Court for the Northern District of Illinois.

[March 8, 1954.]

Mr. Justice Black delivered the opinion of the Court.

This civil action was brought by the Government in a Federal District Court of Illinois against appellees, a trade association of Chicago lathing contractors, two of its member contractors, and a local labor union composed of lathers. The complaint charged a violation of § 1 of the Sherman Act which forbids combinations or conspiracies in restraint of trade or commerce among the states. 15 U. S. C. § 1.* The District Court dismissed the complaint on the ground that it failed to state a cause of action on which relief could be granted. At the same time and for the same reason it dismissed a similar complaint charging a Chicago plasterers' association and a local plasterers' union with violating § 1 of the Sherman Act. Both cases were brought here on direct appeal by the Government under authority of 15 U. S. C. § 29. We have just reversed the District Court's dismissal of the complaint against the plastering group, *United States* v. *Employing Plasterers' Assn. of Chicago, ante,* p. —.

*The Government complaint also charged a violation of § 2 of the Sherman Act but that claim is not pressed here.

Despite some differences in the two complaints, the reasons for reversing the plasterers' case are equally applicable here.

This complaint shows:

> A substantial quantity of lathing material used on Chicago jobs is produced in states other than Illinois, sold by the producers to Chicago building material dealers, shipped interstate either to the Chicago dealers or to their plastering contractor customers, and finally delivered by the plastering contractor to his lathing contractor for use on local building jobs. The alleged conspiracy here is among these lathing contractors and the union whose members do the actual lathing. This combination, according to the complaint, has achieved almost complete mastery over the lathing business in the Chicago area. It limits the number of lathing contractors, prescribes their qualifications, decides who meets the standards prescribed, excludes persons from the business on varied grounds, including arbitrary racial standards, and assigns plastering contractors to each lathing contractor. All of these allegations and more show a substantial suppression of competition in the lathing business.

This complaint charges that an effect of the alleged combination and conspiracy has been that "[i]nterstate trade and commerce in lathing and related building materials has been unlawfully restrained." Other allegations of the complaint emphasize this charge by asserting that any restraint upon lathing work in Chicago "necessarily and directly restrains and affects the interstate flow of lathing materials, and . . . building materials . . . ."

The complaint does state a cause of action on which relief can be granted on proper proof.

Reversed.

BLEED THROUGH– POOR COPY

SUPREME COURT OF THE UNITED STATES

No. 440.—October Term, 1953.

United States of America, Appellant, *v.* Employing Plasterers' Association of Chicago, Journeymen Plasterers' Protective and Benevolent Society, Local No. 5, O. P. & C. F. I. A., and Byron William Dalton.	On Appeal From the United States District Court for the Northern District of Illinois, Eastern Division.

[March 8, 1954.]

Mr. Justice Black delivered the opinion of the Court.

The United States brought this civil action in a Federal District Court charging the defendants (appellees here) with having violated § 1 of the Sherman Act which forbids combinations or conspiracies in restraint of interstate trade or commerce.* Holding that the complaint failed to state a cause of action on which relief could be granted under the Act, the District Court dismissed. The case is before us on direct appeal, 15 U. S. C. § 29, and the only question we must decide is whether the District Court's dismissal was error. We hold it was.

In summary the Government's complaint alleges:

Defendants are (1) a Chicago trade association of plastering contractors; (2) a local labor union of

*26 Stat. 209, as amended by 50 Stat. 693, 15 U. S. C. § 1, so far as here relevant reads:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." The complaint here also charged a violation of § 2 of the Sherman Act, but the Government has not pressed that claim here. Cf. *Standard Oil Co.* v. *United States*, 337 U. S. 293, 314.

BLURRED COPY

plasterers and their apprentices; (3) the union's president. These contractors and union members employed by them do approximately 60% of the plastering contracting business in the Chicago area of Illinois. Materials used in the plastering, such as gypsum, lath, cement, lime, etc., are furnished by the contractors. Substantial quantities of this material are produced in other states, bought by Illinois building materials dealers and shipped into Illinois, sometimes going directly to the place of business of the dealers and sometimes directly to job sites for use by the plastering contractors under arrangements with the dealers. The practical effect of all this is a continuous and almost uninterrupted flow of plastering materials from out-of-state origins to Illinois job sites for use there by plastering contractors. Restraint or disruption of plastering work in the Chicago area thus necessarily affects this interstate flow of plastering materials adversely. Since 1938 the Chicago defendants have acted in concert to suppress competition among local plastering contractors, to prevent out-of-state contractors from doing any business in the Chicago area and to bar entry of new local contractors without approval by a private examining board set up by the union. The effect of all this has been an unlawful and unreasonable restraint of the flow in interstate commerce of materials used in the Chicago plastering industry.

The District Court did not question that the foregoing and other factual allegations showed a combination to restrain competition among Chicago plastering contractors. But the court considered these allegations to be "wholly a charge of local restraint and monopoly," not reached by the Sherman Act. And the court held that there was no allegation of fact which showed that these powerful local restraints had a sufficiently adverse effect

BLEED THROUGH– POOR COPY

on the flow of plastering materials into Illinois. At this point we disagree. The complaint plainly charged several times that the effect of all these local restraints was to restrain interstate commerce. Whether these charges be called "allegations of fact" or "mere conclusions of the pleader," we hold that they must be taken into account in deciding whether the Government is entitled to have its case tried.

We are not impressed by the argument that the Sherman Act could not possibly apply here because the interstate buying, selling and movement of plastering materials had ended before the local restraints became effective. Where interstate commerce ends and local commerce begins is not always easy to decide and is not decisive in Sherman Act cases. See *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219, 232. However this may be, the complaint alleged that continuously since 1938 a local group of people were to a large extent able to dictate who could and who could not buy plastering materials that had to reach Illinois through interstate trade if they reached there at all. Under such circumstances it goes too far to say that the Government could not possibly produce enough evidence to show that these local restraints caused unreasonable burdens on the free and uninterrupted flow of plastering materials into Illinois. That wholly local business restraints can produce the effects condemned by the Sherman Act is no longer open to question. See, *e. g.*, *United States* v. *Women's Sportswear Manufacturers Assn.*, 336 U. S. 460, 464.

The Government's complaint may be too long and too detailed in view of the modern practice looking to simplicity and reasonable brevity in pleading. It does not charge too little. It includes every essential to show a violation of the Sherman Act. And where a bona fide complaint is filed that charges every element necessary to recover, summary dismissal of a civil case for failure

BLURRED COPY

to set out evidential facts can seldom be justified. If a party needs more facts, it has a right to call for them under Rule 12 (e) of the Federal Rules of Civil Procedure. And any time a claim is frivolous an expensive full dress trial can be avoided by invoking the summary judgment procedure under Rule 56.

We hold it was error to dismiss the Government's complaint for failure to state a cause of action.

This leaves the separate contention of the union that it is immune from prosecution for violation of the Sherman Act because of § 20 of the Clayton Act. This contention has no merit under the allegations of the complaint here because they show, if true, that the union and its president have combined with business contractors to suppress competition among them. *Allen Bradley Co.* v. *Local Union No. 3*, 325 U. S. 797.

Reversed.

BLEED THROUGH– POOR COPY

SUPREME COURT OF THE UNITED STATES

Nos. 439 AND 440.—OCTOBER TERM, 1953.

United States of America, Appellant, 439 *v.* Employing Lathers Association of Chicago and Vicinity; Local No. 74 of Wood, Wire and Metal Lathers International Union of Chicago, etc., et al.	On Appeals From the United States District Court for the Northern District of Illinois, Eastern Division.
United States of America, Appellant, 440 *v.* Employing Plasterers' Association of Chicago, Journeymen Plasterers' Protective and Benevolent Society, Local No. 5, O. P. & C. F. I. A., and Byron William Dalton.	

[March 8, 1954.]

MR. JUSTICE MINTON, with whom MR. JUSTICE DOUGLAS joins, dissenting.

That, accepting the pleadings as true, there are and were conspiracies to restrain is not open to question. The question is whether the Sherman Act applies, and that depends upon whether the conspiracies are to restrain interstate commerce. In my opinion, the activities here complained of are wholly intrastate, and the restraint upon interstate commerce, if any, is so indirect, remote and inconsequential as to be without effect and wholly foreign to an intent or purpose to conspire to restrain interstate commerce.

BLURRED COPY

There is no interference with interstate commerce. That commerce ends when the plaster and lath reach the building site, whether they come first to material suppliers and at rest in their warehouses and afterwards on order delivered to the contractors on the job, as most of the transactions are alleged to be handled, or are delivered directly to the job. The construction of a building and the incorporation therein of plaster and lath are purely local transactions.

> "Nor is building commerce; and the fact that the materials to be used are shipped in from other states does not make building a part of such interstate commerce." *Anderson* v. *Shipowners Assn.*, 272 U. S. 359, 364.

The Government does not and could not contend that building is commerce. It contends that the appellees' acts affect commerce, relying upon such cases as *Labor Board* v. *Denver Building Council*, 341 U. S. 675, and *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564. But those cases arose under different statutes, the sweep of which is broader than that of § 1 of the Sherman Act, which declares illegal only those contracts, combinations and conspiracies "in restraint of trade or commerce among the several States." The *Denver Council* case arose under the Labor Management Relations Act, which provides:

> "SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. . . ." 61 Stat. 146, 29 U. S. C. § 160 (a).

Section 2 of that Act defines "affecting commerce" as follows:

> "(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the

BLEED THROUGH– POOR COPY

free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." 61 Stat. 138, 29 U. S. C. § 152 (7).

The *Jacksonville Paper* case arose under the Fair Labor Standards Act, which is applicable to "employees who [are] engaged in commerce or in the production of goods for commerce . . . ." 52 Stat. 1062, 29 U. S. C. § 206. Furthermore, that case dealt with transactions that took place in the stream of commerce. Compare *Higgins* v. *Carr Bros. Co.*, 317 U. S. 572. In the instant cases, the stream of commerce stops at the building site.

Insofar as the factual allegations in these complaints are concerned, the appellees are essentially charged with conspiring to divide the plastering and lathing business in the Chicago area among themselves, limiting the number and classes of persons who may become contractors or union members and reducing competition among the contractors, primarily by means of union control over those who may engage in the business either as contractors or as union members. The acts of the appellees here complained of thus are all related to local building construction and those permitted to engage in such construction. The allegations do not establish any interference with the flow of commerce, at its beginning or end or in the course of its flow, or that anything is done to influence the place from whence or to which the materials come or go, or their price. To be sure, the complaints contain bald statements to the effect that the alleged conspiracies are in restraint of interstate commerce. However, these conclusional allegations add nothing and do not conceal the failure to set forth facts showing any direct or substantial restraint on interstate commerce or a purpose or intent to do so. What is charged in these cases may constitute a restraint under

BLURRED COPY

state jurisdiction and may remotely or indirectly affect interstate commerce. But that has been consistently held to be no violation of the Sherman Act. *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 495; *Levering & G. Co.* v. *Morrin,* 289 U. S. 103, 107.

Industrial Association of San Francisco v. *United States,* 268 U. S. 64, was a case involving far more offensive action than the instant case. In that case, contractors and suppliers, in order to force an "open shop," required builders to secure permits for certain materials from a builders' exchange, refusing such permits to those who did not maintain an open shop. Some of the materials came from other States, and the permits were so handled as to control materials, such as plumbers' supplies, that came altogether from out-of-state sources. This Court, commenting on the "established general facts" of the plan, said:

> "Interference with interstate trade was neither desired nor intended. On the contrary, the desire and intention was to avoid any such interference, and, to this end, the selection of materials subject to the permit system was substantially confined to California productions. The thing aimed at and sought to be attained was not restraint of the interstate sale or shipment of commodities, but was a purely local matter, namely, regulation of building operations within a limited local area, so as to prevent their domination by the labor unions. Interstate commerce, indeed commerce of any description, was not the object of attack, 'for the sake of which the several specific acts and courses of conduct were done and adopted.' *Swift and Company* v. *United States,* 196 U. S. 375, 397. The facts and circumstances which led to and accompanied the creation of the combination and the concert of action complained of, which we have briefly set forth, apart from other

BLEED THROUGH– POOR COPY

and more direct evidence, are 'ample to supply a full local motive for the conspiracy.' *United Mine Workers* v. *Coronado Co.*, 259 U. S. 344, 411." *Supra*, at 77.

In language prophetic, this Court further said:

"But here, the delivery of the plaster to the local representative or dealer was the closing incident of the interstate movement and ended the authority of the federal government under the commerce clause of the Constitution. What next was done with it, was the result of new and independent arrangements." *Supra*, at 79.

Although the permits were used so as to interfere with the free movement of materials and supplies from other States, this Court said:

"It was, however, an interference not within the design of the appellants, but purely incidental to the accomplishment of a different purpose. The court below laid especial stress upon the point that plumbers' supplies, which for the most part were manufactured outside the state, though not included under the permit system, were prevented from entering the state by the process of refusing a permit to purchase other materials, which were under the system, to anyone who employed a plumber who was not observing the 'American plan.' This is to say, in effect, that the building contractor, being unable to purchase the permit materials, and consequently unable to go on with the job, would have no need for plumbing supplies, with the result that the trade in them, to that extent, would be diminished. But this ignores the all important fact that there was no interference with the freedom of the outside manufacturer to sell and ship or of the local contractor to buy. The process went no further than to take

BLURRED COPY

away the latter's opportunity to use, and, therefore, his incentive to purchase. . . ."

. . . . .

"The alleged conspiracy and the acts here complained of, spent their intended and direct force upon a local situation,—for building is as essentially local as mining, manufacturing or growing crops,—and if, by a resulting diminution of the commercial demand, interstate trade was curtailed either generally or in specific instances, that was a fortuitous consequence so remote and indirect as plainly to cause it to fall outside the reach of the Sherman Act." *Supra,* at 80, 82.

As I see it, that is all that happens here. Interstate commerce has ended. There is no intent or purpose to restrain interstate commerce. The effect upon commerce is incidental, remote and indirect. It is a restraint that spends itself on a purely local incident. If contractors of materials and supplies may combine to compel an open shop by far more drastic measures, as in the *Industrial Association* case, then surely the workers and contractors may combine to promote a closed system by an agreement local in its nature.

The case of *Levering & G. Co.* v. *Morrin,* 289 U. S. 103, which followed the *Industrial Association* case, is in point here. In that case, the company, engaged in the building of steel bridges, operated an open shop. The union by strike and other techniques sought to force a closed shop. The company sought an injunction under the Sherman Act. The complaint was dismissed for failure to state a cause of action. This Court said:

"Accepting the allegations of the bill at their full value, it results that the sole aim of the conspiracy was to halt or suppress local building operations as a means of compelling the employment of union

BLEED THROUGH– POOR COPY

labor, not for the purpose of affecting the sale or transit of materials in interstate commerce. *Use* of the materials was purely a local matter, and the suppression thereof the result of the pursuit of a purely local aim. Restraint of interstate commerce was not an object of the conspiracy. Prevention of the local use was in no sense a means adopted to effect such a restraint. It is this exclusively local aim, and not the fortuitous and incidental effect upon interstate commerce, which gives character to the conspiracy. . . . If thereby the shipment of steel in interstate commerce was curtailed, that result was incidental, indirect and remote, and, therefore, not within the anti-trust acts, as this court, prior to the filing of the present bill, had already held. . . ." *Supra,* at 107.

If the union may strike and obtain its objective of a closed shop without interfering with interstate commerce, as in the *Levering* case, the unions in the instant cases could certainly bargain and agree with their employers to reach the same result. See also *United Leather Workers* v. *Herkert,* 265 U. S. 457, and see *United States* v. *Frankfort Distilleries,* 324 U. S. 293, 297, where the cases discussed above are distinguished.

The Government has relied heavily upon *Mandeville Farms* v. *American Crystal Sugar Co.,* 334 U. S. 219. But that decision, as did the *Frankfort Distilleries* case, recognized the distinct line of cases I rely upon here as distinguishable from the holding therein. Page 234.

In No. 440, it is alleged that the appellees have prevented and discouraged out-of-state plastering contractors from doing business in the Chicago area by slowdowns, fines on union labor, intimidation, and other means. Assume that such tactics are effective to keep outstate contractors from seeking contracts in the Chicago area. Contracting to plaster a building in Chicago by

BLURRED COPY

an outstate contractor is not commerce, even if the contractor did intend to bring his men from outstate, any more than bringing men from one State into another to play baseball is commerce. *Toolson* v. *New York Yankees*, 346 U. S. 356; *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs*, 259 U. S. 200, 208. The materials to plaster the building flow without interruption to the building site. There a local labor situation arises that has nothing to do with commerce or any conspiracy to restrain it. That is all that is involved here, and therefore commerce in the sense of that term as used in the Sherman Act is not involved.

I would affirm.

BLEED THROUGH– POOR COPY

BLURRED COPY